

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 UNITED STATES OF AMERICA,)
4 Plaintiff,) Case No. 6:10-CR-60066-HO
5 v.) June 20, 2012
6 STEVEN DWIGHT HAMMOND (1) and)
7 DWIGHT LINCOLN HAMMOND, JR., (2),)
8 Defendants.) Volume 7B
9) Pendleton, Oregon

10 TRANSCRIPT OF PROCEEDINGS
(Jury Trial - Afternoon Session)

11 BEFORE THE HONORABLE MICHAEL R. HOGAN, DISTRICT JUDGE

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(Wednesday, June 20, 2012; 12:50 p.m.)

P R O C E E D I N G S

(Jurors enter.)

THE COURT: I see more water bottles now.

What my staff does to get me to take breaks in the afternoon is bring me Diet Cokes.

(Laughter.)

THE COURT: Go ahead.

MS. SGARLATA: Your Honor, the Government calls Daniel Gonzalez.

THE CLERK: Please raise your right hand.

(Witness sworn.)

THE WITNESS: I do.

THE CLERK: Thank you. Please have a seat.

Please speak clearly into the microphone, and here's some water, if you want some.

Please state your full name and spell your full name for the record.

THE WITNESS: Daniel Gonzalez. D A N I E L,
G O N Z A L E Z.

DIRECT EXAMINATION

BY MS. SGARLATA:

Q. Mr. Gonzalez, can you tell us where you're from.

A. My last place of residence was Burns, Oregon. I had lived

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1 there for approximately 21 years.

2 Q. Okay. And are you familiar with the agricultural culture
3 of Eastern Oregon, the Steens -- in the Steens Mountains?

4 A. Yes. From the time I was in Burns I spent a lot of time
5 working on farms and ranches and participated in a lot of the
6 community events that were associated with those kind of
7 cultural backgrounds, from rodeo to team branding. All kinds
8 of stuff.

9 Q. Okay. And where were you employed while you were living in
10 that location?

11 A. My first professional position was with the Native American
12 tribe. It was Burns Paiute Indian Reservation. And I was
13 there for approximately seven years. I was their first fish
14 biologist. And when I left the program, I ended up becoming
15 the program manager for their natural resource -- well,
16 program.

17 Q. And then after the Burns Paiute tribe, where were you
18 employed?

19 A. With the Oregon Department of Fish & Wildlife. I was the
20 district wildlife habitat biologist for the watershed.

21 Q. And were you employed in that capacity in 2006, 2007?

22 A. Yes.

23 Q. And that was in the location -- in the general vicinity
24 of -- can you look to your left, at the map.

25 Where were you in relation to this location?

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1 A. Well, this is on the Steens, so we were -- my field office
2 was about 60 miles west, in Hines. But this was part of my
3 management area, as far as the state -- state's involvement on
4 the Steens Mountains.

5 Q. Okay. And that was with the Oregon Department of Fish &
6 Wildlife?

7 A. Yes.

8 Q. Okay. Were you involved, in that capacity, in a reseeding
9 project that involved the area near Ignition 3, on the map to
10 your left?

11 A. Yes. We were -- we worked cooperatively with the --
12 Charlie Otley and his ranch, as well as the B.L.M. folks that
13 were managing that area, the range cons and some of the
14 wildlife biologists. We partnered up to help reseed the
15 private land and then part of that public land as well.

16 Q. Okay. And what B.L.M. individuals were involved in that?

17 A. Well, in the field, it was the range conservationist for
18 the B.L.M. at the time, which was Joe Glascock.

19 Q. Okay.

20 A. And in more of our office setting, where we were doing
21 planning, it would have been their wildlife biologist. I think
22 it was Matt O'Bradovich, and -- oh, I can't remember his name.
23 He -- he was the head of the range program there at the B.L.M.

24 Q. Okay.

25 A. Anyways, there was some internal staff. But the field guy

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1 that I dealt with was Joe Glascock.

2 Q. Okay. And why were you involved in reseeding in the
3 vicinity of Ignition No. 3?

4 And I see that the projection screen to your right
5 has a blown-up version of that general area.

6 A. Well, this red section down here, it's the Grandad fire.

7 And there was a lot -- well, it was -- the private
8 land is what we were concerned with. The private land, as
9 well as the public land. But the private land is where we
10 had -- we were able to have the most impact because of the
11 resources we had available for private landowners.

12 With Mr. Otley, we worked together on putting an
13 emergency seeding -- reseeding project together through the
14 access and habitat program, which is facilitated through
15 Oregon Fish & Wildlife.

16 I was responsible for that program. And Charlie and
17 I put together this application. Before I submitted it,
18 though, I coordinated with the B.L.M. staff, and others, to
19 make sure that the prescriptions we were proposing were
20 adequate for the area. And they fit kind of the objectives
21 that were not only satisfying the Oregon Fish & Wildlife but
22 as well as B.L.M. and the private landowner at the same time.

23 So wildlife, recreation, and then whatever grazing
24 attributes Mr. Otley was trying to recover.

25 Q. Okay. So what were the characteristics of the particular

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1 area you were involved in reseeding that required there be
2 reseeding?

3 MR. BLACKMAN: I just object, your Honor, to
4 relevance.

5 MS. SGARLATA: It's relevant to -- in particular to
6 the charge of depredation of Government property with respect
7 to the Grandad fire.

8 THE COURT: Just a moment. Don't -- please. The
9 objection is overruled.

10 MS. SGARLATA: Thank you.

11 THE WITNESS: Can you state that question again,
12 please.

13 BY MS. SGARLATA:

14 Q. Why did this area need to be reseeded?

15 A. Well, it was particularly important to a lot of wildlife
16 species that were significant to the citizens of Oregon for
17 recreation, as well as some of the sensitive species that were
18 critical to our government partnering agency, B.L.M., like sage
19 grouse.

20 This area had a lot of high-value recreation for
21 public use. Not so much on Otley's property, but in and
22 around the public lands.

23 Eventually we negotiated an agreement with Mr. Otley
24 to access his property for recreation because of the -- the
25 values that it supported for -- for the public. And --

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1 Q. What kind of recreation does the public -- or would the
2 public be doing in this area here?

3 A. It would be -- a lot of it would be hunting-type
4 recreation. So big game, as well as some birds, including sage
5 grouse.

6 But we also had a significant number of our citizens
7 that used it for viewing. Wildlife viewing. And then just
8 general recreation, camping, fishing. So --

9 Q. Now, I think you mentioned some of the wildlife, in
10 particular, that would be involved in rec -- in recreation and
11 viewing. You mentioned sage grouse and mule deer.

12 Are there any other types of wildlife that fall
13 within the category?

14 A. Yes. There's a -- any of our big game species would be
15 considered -- well, at least in Southeast Oregon, aside from
16 the bighorn sheep.

17 So we -- your more common species that the public
18 would seek in this area would be your mule deer, antelope,
19 pronghorn, elk, and as well as your upland game birds like
20 sage grouse, California quail, and maybe Chukars. Although
21 they wouldn't be as common there. But in some of those areas
22 you would find them.

23 MS. SGARLATA: Now, I would ask Ms. Root to pull up
24 Exhibit 71, and to magnify it in that same area that Exhibit 70
25 was just magnified.

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1 BY MS. SGARLATA:

2 Q. Are you familiar with the location shown in this map?

3 A. Yes.

4 Q. Does the location shown in this map include the area that
5 you were involved in reseeding?

6 A. Yes.

7 Q. Now, I'm not sure if it's up there right now. Can you tell
8 me, is there a laser pointer up there in front of you?

9 A. Right here (indicating).

10 Q. Now, would you be able to point on the map, to show the
11 jury what you were involved in reseeding?

12 A. Well, we have a -- there's an application that we filled
13 out that had legal descriptions of the areas. But from what I
14 remember, it had most of this area (pointing), in here, the
15 private land. And I think McCoy Creek is down on this end.
16 But everything from this area, all the way through on this
17 B.L.M. land -- which is, I think, Ignition 3 -- and then on
18 south, down in this general area as well.

19 Even though this wasn't considered the Grandad fire,
20 it did -- it did have fire damage, and we reseeded this area
21 down in here as well.

22 For the purposes of this fire here, we did reseed
23 most of this, excluding this little corner here. But most of
24 the perimeter of this area.

25 Q. Okay. And what kind of seeds were involved in the

1 reseeding?

2 A. It was a mixed selection of native and non-native. Partly
3 because of the limited funding we had available for this
4 program. There was a lot of fires throughout the state, and so
5 there was -- because of that limited funding we had to be
6 really selective on what we chose. We would have liked to stay
7 with a purely native mix. But at the time, from what I
8 remember, we were looking into putting in sagebrush as part of
9 our prescription. But it was so expensive that we couldn't
10 afford any significant amount that would make a difference. So
11 we chose other species that were comparable and had the same
12 kind of effect. Maybe in a shorter period. But we put, maybe,
13 non-native seed in the ground that would secure it, but it
14 would provide maybe some cover, some forage. And the life
15 expectancy would be short enough that it allowed the natives to
16 recover themselves over a period of time and reduce any
17 potential weed infestations.

18 Q. Okay. So was there concern that if this reseeding wasn't
19 done as you did it, that the area that you actually did reseed
20 would have been -- would not have been an appropriate habitat
21 for the animals that you've just mentioned?

22 A. Well, any time this kind of fire occurs, there's always a
23 level of, like, successional recovery that occurs. And with
24 the threat of -- of weeds, there's always a chance that that
25 succession will get interrupted and maybe taken over by

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1 something that -- that is not beneficial or useful to our
2 wildlife species.

3 So it was important for us to make sure that we got
4 a jump -- at least on the recovery part of the burned area --
5 to -- to encourage at least the regrowth of the habitat, as
6 well as preparing and -- and securing the soils so you would
7 minimize the erosion effect.

8 But from what happened in the fire, we had
9 displacement with our wildlife species that occurred. So
10 some of the usual uses that were associated with this area,
11 we lost that -- that effect because of the lack of habitat
12 cover that was associated with this type of terrain. More or
13 less, your low-end sagebrush that supported your mule deer,
14 your antelope, and your sage grouse birthing and rearing
15 areas.

16 So in that general vicinity, you would have sage
17 grouse rearing their young. And same with the antelope and
18 the mule deer. And with a lack of that habitat that
19 supported those characteristics, they were displaced. So it
20 was important for us to recover it because of the fragmented
21 habitat, you know, in and around the area.

22 Q. And so the sage grouse and the mule deer that were in this
23 location, are those animals that the public can go there to
24 hunt?

25 A. Well, definitely on the public land, and with the right

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1 permits and tags. But on the private land, up until we secured
2 that access from Mr. Otley, that was excluded.

3 But with this program, the Access and Habitat
4 Program, we were able to secure the use of the road, that
5 Moon Hill Road, as well as, you know, all of that private
6 land that he owns, you know, in that area.

7 Q. Now, what actions did you undertake in order to
8 rehabilitate this land?

9 A. Well, we -- I had prior knowledge of the area because of
10 the work I did with the Oregon Fish & Wildlife. I managed a
11 640-acre piece of state property just south of that that's
12 known as Fish Lake. We have a -- a mutual management agreement
13 with the Bureau of Land Management. They do a lot of the
14 recreational support for the Fish Lake campground area. And
15 then we manage the grazing in and around the site.

16 So because of my exposure and even some of the
17 wildlife surveys I performed in this area, I knew kind of
18 what it -- well, I knew what it looked like, and I knew what
19 we -- would like to recover it and -- you know, to get that
20 similar characteristic.

21 But it was important enough because of the -- the
22 sensitivity of the sage grouse and our wildlife species, and
23 we knew that it was highly used by those -- by those animals.
24 So we were trying to recover it the best we could with the
25 resources we had.

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1 Q. Why couldn't the sage grouse just go somewhere else?

2 A. Well, they could, but some of these areas are unique to
3 certain populations. And when you have populations that are
4 used to -- accustomed to these kinds of sites, they tend to
5 come back and try to use it again. And with a lack of that
6 cover, you get that displacement. So when they go somewhere
7 else, they have a higher risk of predation. And then also
8 competing with other resources that maybe other animals are
9 using.

10 So there's a level of competition, there's increased
11 predation. And so the success rate of those birds generally
12 declines. So --

13 Q. So without the plants there that the sage grouse need, the
14 sage grouse are more likely to get eaten by other animals, or
15 what have you?

16 MR. BLACKMAN: Objection, leading.

17 THE COURT: Sustained.

18 MS. SGARLATA: I direct your attention to Government
19 Exhibit 65. And ask Ms. Root to bring that exhibit up.

20 And could you enlarge the section near Section 11,
21 if you're able to.

22 See those numbers.

23 Is this the shaded relief version of that?

24 (Pause, Ms. Sgarlata and Ms. Root conferring.)

25 BY MS. SGARLATA:

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1 Q. Do you see Section 11 on the map, Government Exhibit 64?

2 A. (Pointing). This section right here?

3 Q. Yeah.

4 A. Yes.

5 Q. Okay. Now -- and do you see Section 2 on that map, as
6 well?

7 A. Section 2. Right above it. Yes.

8 Q. Okay. Are you aware of the section, township, and range
9 that you were involved in seeding the parts that were on
10 Government land?

11 A. Yeah. I mean, I know -- I know from looking at documents
12 that I had in the application that it included this area right
13 in here.

14 Q. Okay. And were -- you were involved in choosing the kinds
15 of seeds that were going to be put down there for the
16 reseeding. Correct?

17 A. Right.

18 Q. Do you know how much those seeds cost?

19 A. Well, altogether, it was -- it was proposed as a seed mix.
20 So individually, I can't remember. But I know that the total
21 cost of the seeding area was about 50,000 dollars.

22 Q. And how much of that was on Government B.L.M. land?

23 A. At least 100 acres that we seeded on B.L.M., in this --
24 in -- between Section 2 and 11.

25 Q. And how much did it cost to seed the hundred acres that

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1 were on B.L.M. land?

2 A. Well, if you took the 50,000 and divided it by how many
3 acres we seeded, it was approximately 20 dollars an acre.

4 Q. Okay.

5 A. So about 2,000 dollars.

6 MS. SGARLATA: So I'm going to ask the assistance of
7 the clerk to hand you Government Exhibit 237. And I'll put a
8 sticker on it.

9 Oh, I'm sorry. Government Exhibit 267.

10 And I'll also show this to defense. This is
11 Discovery Nos. 06G18172.

12 And I do believe I have another copy of it here.

13 (Pause, the clerk and Ms. Sgarlata conferring.)

14 (Witness handed document.)

15 BY MS. SGARLATA:

16 Q. Now, do you recognize that document that you're looking at?

17 A. Yes.

18 Q. What is that?

19 A. This is a breakdown of the seeds that we proposed for the
20 reseeding project, with the associated costs.

21 Q. And are those in fact the seeds that you ended up reseeding
22 with?

23 A. Yes.

24 Q. All right. And are those the numbers that you were using
25 when you determined how much it cost to reseed the Government

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1 portions of the land that you reseeded?

2 A. It would all be included, yes.

3 Q. Okay. Now, I'm going to ask if -- you recently located
4 photographs of the particular areas that you reseeded in
5 reference to the Grandad fire. Is that correct?

6 A. Correct.

7 MS. SGARLATA: I'm going to ask Ms. Root to put --

8 MR. BLACKMAN: Your Honor, I'm going to object, again,
9 on relevance grounds.

10 With respect to the last exhibit, it doesn't appear
11 to lead to anything but private land. I don't see what
12 relevance it has to anything we're talking about.

13 THE COURT: It hasn't been offered.

14 MS. SGARLATA: It's not going to be offered. It was
15 just to -- for his reference.

16 THE COURT: Then the objection is sustained.

17 MR. BLACKMAN: Thank you.

18 MS. SGARLATA: I would ask that Ms. Root bring up
19 Government Exhibits 236 through 258.

20 Do we have a copy for the judge?

21 Your Honor, I believe yesterday we provided the
22 Court and counsel with copies of Government's Exhibit 236
23 through 258, which are photographs of the particular area in
24 question that Mr. Gonzalez is testifying about having
25 reseeded. And -- (Pause, conferring.)

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1 I have an extra copy of it, in case we actually --

2 And then I would ask Ms. Root to show Government
3 Exhibit 236.

4 BY MS. SGARLATA:

5 Q. And now I'll ask, Mr. Gonzalez, do you recognize this
6 photograph?

7 A. Yes, I do.

8 Q. Did you take this photograph?

9 A. I did.

10 Q. What is this photograph of?

11 A. It's a -- a view of the southern part of the area that we
12 seeded on Mr. Otley's project.

13 Q. And what does this photograph show that's relevant to what
14 we're talking about?

15 A. Well, it shows the recovery after the fire, and a lot of
16 it -- what you're seeing is more of your forbs and grasses,
17 which is what you would expect in recovery.

18 Q. Okay. I would ask you --

19 MR. SCHROEDER: Your Honor, could -- were these
20 exhibits admitted?

21 MS. SGARLATA: They have --

22 MR. SCHROEDER: They're being published to the jury,
23 your Honor.

24 MR. PAPAGNI: You have to offer them.

25 MS. SGARLATA: I'm sorry, your Honor. The Government

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1 would offer Government Exhibits 236 through 258.

2 MR. SCHROEDER: May I ask a question in lieu of an
3 objection?

4 THE COURT: You may. Yes.

5 MR. SCHROEDER: Mr. Gonzalez, is Exhibit 236 a picture
6 looking east onto Otley's private land, as opposed to public
7 land?

8 THE WITNESS: Yes, this particular picture.

9 MR. SCHROEDER: Just objection then, following up --

10 THE COURT: The objection is sustained.

11 Please take the picture down.

12 BY MS. SGARLATA:

13 Q. Are these pictures substantially the same as the Government
14 part of the lands that you reseeded?

15 A. Yes.

16 THE COURT: They're not received.

17 MS. SGARLATA: Okay. I have no further questions.

18 THE COURT: Thank you.

19 You may cross-examine.

20 MR. SCHROEDER: One moment, please, your Honor.

21 CROSS-EXAMINATION

22 BY MR. SCHROEDER:

23 Q. Mr. Gonzalez, my name is Alan Schroeder. I have a few
24 questions.

25 You indicated that you did this reseeded on

Gonzalez - X - By Mr. Schroeder

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1 Mr. Otley's private land and apparently a few acres on the
2 public land. Is that correct?

3 A. Correct.

4 Q. I believe you said -- what? 100 acres of public land?

5 A. Yes.

6 Q. And so the rest of the acres were on private land?

7 A. That's correct.

8 Q. Now, you also mentioned that to give Mr. Otley the
9 incentive for you to go on and do this seeding on his private
10 land, you had got the money from some kind of habitat access
11 fund. Is that correct?

12 A. Yes.

13 Q. And that habitat access fund is a fund in which the Oregon
14 Department of Fish & Wildlife will give a private landowner
15 sums of money for projects on his private land, but in return,
16 the private landowner has to give Oregon Department of Fish and
17 Game and the citizens of Oregon access to the private land for
18 hunting and fishing and recreational purposes?

19 A. That's only partially correct.

20 Q. Okay. Tell me what -- the part that is correct?

21 A. The project we seeded Mr. Otley's land in was through the
22 Access and Habitat Emergency Seeding Program. So that's unique
23 just to habitat. There's no requirement to allow any public
24 access on his property. That was a separate program.

25 Q. Okay. But was he part of that, then, program? That public

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1 access program?

2 A. After the reseeding, yes.

3 Q. Okay. And did that have to do with any part of the
4 activity associated with this seeding, or independent of it?

5 A. It was independent.

6 Q. Okay. Now, what part of it is that Mr. Otley is part of
7 this access, allowing public access to private land?

8 A. I don't understand what you mean by "what part."

9 Q. Poor question. Thank you.

10 Is this land that's covered by the seeding part of
11 the habitat access program in which the public is allowed
12 access to it?

13 A. Say that again, please.

14 Q. This reseeding area, is the public entitled to public
15 access to it because of some agreement that you have with
16 Mr. Otley?

17 A. It was independent of -- both projects were independent of
18 each other. So we reseeded through the emergency seeding
19 program. And that didn't require any access, other than him
20 allowing us to enter into a cooperative agreement for
21 restoration. And it was for the benefit of the wildlife.

22 The access part of it was separate. And that -- it
23 was exclusive for allowing public use on his property for --
24 for the purposes of recreation.

25 Q. Okay. But did Mr. Otley allow that access as part of this

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1 overall agreement?

2 A. Well, it wasn't overall. They were separate. And I -- I'm
3 trying to make that distinction. Because it wasn't like we
4 asked him, We'll give you the seed, if you allow access.

5 Q. Okay.

6 A. They were independent of each other.

7 Q. Okay. That was my question. Thank you.

8 Now, the other -- other part of your testimony is --
9 is the -- the seed mix. And I have a few questions about
10 that.

11 You indicated that you worked for -- in the Burns
12 area for 21 years, and you worked with the Burns Paiute
13 tribe. And then you worked for Oregon Department of Fish and
14 Game.

15 Who do you work for right now?

16 A. U.S. Forest Service.

17 Q. Okay. And are you testifying here today as an employee of
18 the Forest Service or as a representative employee of the
19 Oregon Department of Fish & Wildlife Service?

20 A. I believe it's the Oregon Fish & Wildlife.

21 Q. Okay. And so are they paying you to -- not paying you to
22 testify. But they're paying you for your employment here
23 today?

24 A. No.

25 Q. Okay. You're still on the salary of the -- of the Forest

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1 Service, but you're here, representing the Oregon Department of
2 Fish and Game?

3 A. I don't believe the Forest Service is paying my salary
4 today. It's on a unique code that's specific to this case.

5 Q. Okay. I guess I'm trying to understand which hat you have
6 on.

7 Let's make it simple. Which hat do you have on
8 today? A hat of the Oregon Department of Fish & Wildlife
9 Service or a hat of the U.S. Forest Service?

10 A. Well, I'm here speaking about the activities that took
11 place when I worked for Oregon Department of Fish & Wildlife.

12 Q. Okay. So then if that's the case, then let me ask you
13 this.

14 At the time, then, that this occurred in 2006 -- and
15 that's what you are apparently here to testify for -- were
16 you -- were you an appraiser of the Oregon Department of Fish
17 & Wildlife?

18 A. No.

19 Q. Okay. You were just a biologist?

20 A. Yes.

21 Q. And did you prepare any report for the Oregon Department of
22 Fish & Wildlife in doing this in accordance with any type of
23 appraisal standards?

24 A. Like property appraisals? Or wildlife appraisals?

25 Q. No, property appraisals.

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1 A. No.

2 Q. Okay. So you didn't -- you didn't conform to the uniform
3 standards of professional appraisal practice in pre --
4 performing your analysis of the cost/benefits associated with
5 this activity. Is that correct?

6 A. No, we were strictly focused on wildlife and the habitat.

7 Q. I understand. But you have testified as to certain
8 numbers, certain cost numbers. And I'm just simply asking you
9 that in any appraisal report, applying these particular uniform
10 standards of professional appraisal practices, using the cost
11 approach, did you do that?

12 A. No. The costs I gave you were associated with the price of
13 seed and the costs for the application.

14 Q. I understand. But you didn't apply any particular -- I
15 don't want to argue with you about it.

16 But you didn't apply any particular approach,
17 according to these standards that I have indicated, that
18 there may be some cost-benefit analysis associated with it?
19 You didn't do any of that?

20 A. No.

21 MR. SCHROEDER: No further questions. Thank you.

22 MR. BLACKMAN: No questions.

23 MS. SGARLATA: No further questions.

24 THE COURT: Thank you, sir. You may step down.

25 MR. PAPAGNI: Please the Court, the Government rests

Taylor - D - By Mr. Matasar

1733

1 its case.

2 THE COURT: Thank you.

3 Counsel, I'll reserve your motions.

4 Please call your first witness.

5 MR. MATASAR: Okay. Jacon Taylor.

6 (Pause.)

7 THE CLERK: Please step forward.

8 Please raise your right hand.

9 (Witness sworn.)

10 THE WITNESS: Yes, I do.

11 THE CLERK: Thank you.

12 Please have a seat. Thank you.

13 Please speak clearly into the microphone, and

14 there's water if you want some.

15 THE WITNESS: Thank you.

16 THE CLERK: Please state your full name and then spell

17 your name for the record.

18 THE WITNESS: Jacon Taylor. J A C O N, T A Y L O R.

19 DIRECT EXAMINATION

20 BY MR. MATASAR:

21 Q. Mr. Taylor, how are you employed?

22 A. I work for a marketing company right now.

23 Q. Okay. Where do you live?

24 A. Eugene, Oregon.

25 Q. Where did you grow up?

Taylor - D - By Mr. Matasar

1734

1 A. Graduated high school in Eugene, so that's probably where I
2 grew up.

3 Q. Okay. Did you ever work at Hammond Ranches?

4 A. Yes, I have. Various times. Yes. I guess, growing up,
5 the first time would have been in high school, between, I
6 believe, my sophomore and junior year.

7 Q. Okay. And did that continue on from time to time?

8 A. Yes, it sure did. Over the years, for various lengths of
9 time. Yes.

10 Q. Are you related to anybody in the Hammond family?

11 A. Yes, I am. Earlyna is my aunt. She is my mother's sister.

12 Q. And Earlyna is Steve Hammond's wife?

13 A. Correct.

14 Q. Okay. Were you in an elk hunt at Hammond Ranches in
15 September of 2001?

16 A. Yes.

17 Q. I would like to show you what's been admitted as Exhibit
18 1215.

19 I'm sorry.

20 THE COURT: Wrong elk.

21 (Laughter.)

22 MR. MATASAR: How about -- let me see. Which one
23 here? I'm sorry.

24 THE COURT: That elk has big floppy ears.

25 (Laughter.)

Taylor - D - By Mr. Matasar

1735

1 MR. MATASAR: Yes, there we go.

2 MR. BLACKMAN: That's Exhibit --

3 MR. MATASAR: That's 1213.

4 BY MR. MATASAR:

5 Q. Do you -- could you identify the people in that photo.

6 A. Yes, I believe I can.

7 Q. Okay. Could you do that.

8 A. You want me to --

9 Q. Let me -- I can -- I can use the pointer, and then you
10 could just -- I'll follow it -- I'll start here with this
11 person with the green shirt.

12 A. That would be me.

13 Q. Okay. And how about this person? Could you tell who that
14 is?

15 A. I believe that to be Rusty.

16 Q. Okay. Rusty who?

17 A. I'm sorry. Rusty Hammond.

18 Q. Okay. Was -- was -- as far as you recall, was he at the
19 elk hunt in September of 2001?

20 A. Yes.

21 Q. Okay. And do you recall if Dusty Hammond was at the elk
22 hunt at that time?

23 A. Yes, I do. He -- he was.

24 Q. Could -- could you tell -- this is only a small part.

25 Can you tell who that is?

Taylor - D - By Mr. Matasar

1736

1 A. I believe that to be Dusty Hammond.

2 Q. Now, you see Rusty Hammond is wearing a white hat.

3 A. Yes.

4 Q. Did he wear that hat when he was hunting?

5 A. I believe so. He -- I would believe so, yes.

6 Q. Okay. Is it common that people wear a white hat when
7 they're deer hunting?

8 MR. PAPAGNI: Objection. Asking the witness to
9 speculate, what's common.

10 THE COURT: Overruled.

11 THE WITNESS: So the question is is it common --

12 BY MR. MATASAR:

13 Q. Is -- are --

14 A. Is it common to wear a white hat?

15 Q. A white hat during deer hunting season, or when you're
16 hunting for deer?

17 A. I wouldn't think it would be common. I wouldn't do it.

18 Q. Okay. Why wouldn't you do it?

19 A. The deer can see you. Deer can -- it's white. It's --

20 Q. And what about other hunters?

21 A. I wouldn't expect them to be, just because it's white.

22 Q. Might they get confused, if they see somebody -- some
23 white? Might they think it's a deer?

24 A. They could think it was a deer butt, yes.

25 Q. Where were you living at the time of this elk hunt?

Taylor - D - By Mr. Matasar

1737

1 A. I was living in Eugene at the time, in September 2001.

2 Q. About how long of a drive is it from Eugene to the Hammond
3 ranch?

4 A. It is about -- it's a solid six-hour drive from door to
5 door.

6 Q. And you were working at that time?

7 A. Correct, I was.

8 Q. Were you at a deer hunt about two weeks after this elk
9 hunt?

10 A. No, I wouldn't have been there. The job I had at the time
11 wouldn't have allowed me to take multiple weekends off in a
12 row.

13 Q. Okay. Now, I'm not going to go through it because it's
14 kind of cumbersome. But if you assume that there's evidence
15 that's been admitted in this court that you didn't have a deer
16 tag to go hunting for deer in late September of 2001, would you
17 have gone hunting?

18 A. If I did not have a tag, I would not have gone hunting.

19 Q. Okay. Let me show you Exhibit 2001 -- I'm sorry. Exhibit
20 1001. It's a Government map.

21 MR. MATASAR: That's -- you're going too fast. Up --

22 (Pause, counsel conferring.)

23 MR. MATASAR: Do we have a hard copy of No. 1?

24 (Witness handed notebook.)

25 BY MR. MATASAR:

Taylor - D - By Mr. Matasar

1738

1 Q. Okay. That's the one I'm looking for. Thank you.

2 Can you see that?

3 A. Yes. Both places.

4 MR. MATASAR: Now, could you, Ms. Root, enlarge the
5 part from -- just the green part.

6 MS. ROOT: (Nods head.)

7 MR. MATASAR: The green arrows, and such. Okay.

8 BY MR. MATASAR:

9 Q. Are you familiar with the old gravel pit?

10 A. Yes, I am.

11 Q. And what about Rock Jack Gate?

12 A. Yes.

13 Q. Okay. Do you recall ever hunting -- and you would hunt
14 from time to time at the Hammond ranch. Right?

15 A. Yes, that is correct.

16 Q. Do you recall ever hunting in the area of the rock pit or
17 the rock -- or the gravel pit or the Rock Jack Gate?

18 A. Yes, I do recall hunting in that area.

19 Q. Okay. Could you tell the jury, was it a deer hunt?

20 A. No, it was an elk hunt.

21 And the reason I remember that is because typically
22 we walk from that -- if we start at that gravel pit,
23 typically we'll walk --

24 Q. So starting down here (pointing)?

25 A. Correct. Start in the bottom right-hand corner.

Taylor - D - By Mr. Matasar

1739

1 Q. Okay.

2 A. If we do that, typically we'll walk all down-country,
3 and -- and be picked up on the road where the red dots are.

4 Q. Here?

5 A. No, it would be further north. Yeah, right about in there.

6 Q. Okay.

7 A. Or even sometimes in the bottom, where the creek is,
8 actually.

9 Q. Okay.

10 A. And the reason I remember is only one time I walk --

11 Q. Do you have a pointer there --

12 A. Oh, maybe. Yeah. If I can make it work.

13 Q. Don't point it -- there you go. Go ahead.

14 A. So the reason I remember, is because only one time I've
15 walked up here, and (pointing) I remember because it was so
16 steep. It's -- it's a climb to go from here to here.

17 You can get there other ways that aren't as
18 strenuous, but I do remember that specifically because I
19 didn't want to do it anymore.

20 (Laughter.)

21 BY MR. MATASAR:

22 Q. And was Dusty Hammond with you at that time?

23 A. He was there at the hunt, but I'm not -- I'm not for sure
24 if he actually did this (pointing).

25 And -- and for this particular day, as I recall, I

Taylor - X - By Mr. Blackman

1740

1 went -- I went down into this area, where the elk were
2 supposed to be. And then ended, essentially, hunting in my
3 mind, there, to climb out right there.

4 Q. Okay. And you don't recall if Dusty Hammond was there, or
5 not?

6 A. I don't recall if he was on this particular drive.

7 I -- I do recall that he was there that day because
8 after that -- because -- because after that, we left and went
9 to the top of the school section.

10 Q. Okay.

11 A. And -- and he accidentally fired his gun right at the
12 beginning of the hunt. And so I remember, because it upset me.

13 Q. But you're certain that was an elk hunt, not a deer hunt?

14 A. I'm certain it was an elk hunt, yes.

15 Q. And you're certain you were not deer hunting on --

16 MR. PAPAGNI: Objection, leading.

17 THE COURT: Sustained.

18 MR. MATASAR: Okay. That's all I have.

19 Thank you, Mr. Taylor.

20 THE WITNESS: Um-hmm.

21 MR. BLACKMAN: I would ask my learned counsel,
22 Mr. Schroeder, to put Exhibit 1210 on the screen, please.

23 CROSS-EXAMINATION

24 BY MR. BLACKMAN:

25 Q. And while he's doing that, Mr. Taylor, as I understand it,

Taylor - X - By Mr. Blackman

1741

1 you have worked over the years for Hammond Ranches?

2 A. Correct. Yes.

3 Q. And how would you -- describe how often -- how much time
4 you've spent working on Hammond Ranches.

5 A. I don't know an exact time. I would go out there during
6 the summer, in high school. And then after high school, I
7 would come out and work for anywhere from nine months to a
8 year, to a little over a year during various times. I just
9 enjoy it out there. I like the smell of the sagebrush, I
10 guess.

11 And then I think I would need to go make money
12 somewhere, and so I would go back and do that, or thought
13 maybe I needed to do something else. So -- but at various
14 times. I don't know exactly how many.

15 Q. Okay. And I'm just going to ask you, you're familiar with
16 the areas of the different pastures that they use on the Steens
17 Mountain?

18 A. Yes.

19 Q. And you're familiar with an area that's on 1210 labeled
20 Hardie summer allotment?

21 A. Yes.

22 Q. Okay. Have you ever spent time working on the ranch in
23 that area?

24 A. Yes.

25 Q. And what kind of work have you done in that area?

Taylor - X - By Mr. Blackman

1742

1 A. I've fixed some fences, just going on this -- trying to
2 figure out -- I would have fixed some fences there. I would
3 have moved some cattle through there at various times.

4 Q. Okay. Would you take your pointer and show us where you
5 worked on the fences.

6 A. Okay. Primarily in the (pointing) -- well, primarily, it
7 would have been fences in -- let me make sure I get my map
8 right here, guys. Sorry.

9 Q. The arrows are -- the words are outside the areas, and the
10 arrows are inside the areas.

11 A. Yeah. Primarily, it would have been fences in -- just in
12 this hole. And I don't know what all is considered Hardie
13 summer, because I just don't. But primarily the fences would
14 be in, I believe, this area, and all the way down into there.

15 Q. So with respect to the fences in the area to the -- I guess
16 that would be east, to the right side of that map.

17 A. Okay.

18 Q. And the area right around the words "Hardie summer
19 allotment," you're familiar with the fences in that area?

20 A. Yes.

21 Q. And are you also familiar with the gates in that area of
22 that fencing?

23 A. Yes.

24 Q. And how many gates are in that area?

25 A. Are you meaning like in here (pointing)? Or --

Taylor - X - By Mr. Blackman

1743

1 Q. And further up north. Yeah, right about in that corner,
2 and up in around that area.

3 A. Well, from here (pointing) there's -- there's a gate in the
4 bottom. There's a gate in the road, two. Three, in the
5 corner. Four, in the bottom there. And then, five, halfway
6 up, out of that canyon there (pointing).

7 As far as this -- yeah, as far as that fence, I
8 believe -- I don't believe -- do you know? Is that -- what
9 boundary fence is that?

10 Is that -- I'm trying to figure out what is private
11 land and what isn't, is what my question is.

12 Q. Okay. I think the private land is the land with the
13 crosshatching, that goes --

14 A. With these red -- with those?

15 Q. Right.

16 A. Is that correct?

17 Q. Correct.

18 A. Yeah, because I think Charley fixes that fence, is why I
19 was asking.

20 Q. So there are about five gates in the area?

21 A. Yeah, in this fence there are. There's, like I said, one
22 in the bottom. One in the road. One in the corner's three.
23 One in the bottom, and one halfway up.

24 Q. And those -- the fence where those gates are divide what
25 pastures?

Taylor - X - By Mr. Papagni

1744

1 A. The north field from the -- and this is over the years, has
2 been called a lot of other fields. Just -- at the ranch. So I
3 would say below the north field, but I don't know what it's
4 called to people who know.

5 Q. Okay. And when you say "below," you mean downhill?

6 A. Correct. Yes. Downhill. Um-hmm.

7 MR. BLACKMAN: Thank you. No other questions.

8 THE COURT: Cross.

9 CROSS-EXAMINATION

10 BY MR. PAPAGNI:

11 Q. In 2001, Mr. Taylor, were you successful in getting a tag
12 for buck deer and elk?

13 A. In 2001, was I successful for getting a tag for buck deer,
14 and elk.

15 Q. Deer and elk.

16 A. The way I recall that is that I did have an elk tag, and I
17 also believed that I purchased a deer tag. But I believe it
18 was for outside of Oakridge, somewhere.

19 Q. And in that regard, sir, when you testified before the
20 grand jury, you were asked questions about 2001 hunting. And
21 you said you didn't recall hunting that particular year, didn't
22 you?

23 A. That is correct. I did not recall.

24 Q. So what has changed that made you recall so well, as
25 opposed to what you told the grand jury a couple of years ago?

Taylor - X - By Mr. Papagni

1745

1 A. I've been trying to think a lot about this issue.

2 Q. Right. And your relationship to --

3 THE COURT: Let him finish his answer.

4 MR. PAPAGNI: I'm sorry, Judge.

5 THE WITNESS: That was my answer. I've been thinking
6 a lot about this issue.

7 BY MR. PAPAGNI:

8 Q. And what is your relationship with Steven Hammond?

9 A. Steven would be my uncle.

10 Q. And you've gone hunting with him on several occasions, have
11 you not?

12 A. Yes, I have.

13 Q. And you've been employed on the Hammond ranch for several
14 years, were you not?

15 A. Yes, I was.

16 Q. And you left the ranch how many years ago?

17 A. Well, this last time, it was just this last fall.

18 Q. Now, you worked full time on the Hammond range from May
19 2008 to June 2010, did you not?

20 A. No, this last time would have been from -- yeah, May 2008
21 to just this last fall in 2011.

22 Q. So the question I asked you is correct? From May 2008 to
23 June 2010?

24 A. No. I think you're saying 2010.

25 Q. Correct. You worked there longer?

Taylor - X - By Mr. Papagni

1746

1 A. Yes. I worked there from May 2008 to just this last fall.

2 So if this is 2012, then this last fall would be
3 2011.

4 Q. And what work -- what work did you do on the Hammond ranch?

5 A. Just whatever needed to be done. We would raise hay, and
6 we would raise cattle.

7 Q. And how many times did you go hunting with Dusty Hammond?

8 A. I only recall the one time. Because, like I say, it sticks
9 out because he frustrated me.

10 Q. Pardon me?

11 A. I say it sticks out because he frustrated me on that one
12 elk hunt. And that's the only time I recall.

13 Q. So when you were asked in grand jury on June 17th, 2010:

14 Question: More specifically around 2001, the last
15 day of deer hunting season, do you recall an event
16 that occurred?

17 You now recall only the elk hunt?

18 A. Well, yeah. I only -- I do -- I believe I only recall
19 hunting one time with Dusty. And I believe it was during elk
20 season. So --

21 Q. At the time you were hunting with Dusty, did you have an
22 upset stomach?

23 A. I --

24 Q. Do you remember that?

25 A. I don't think -- I don't know. Perhaps.

Taylor - X - By Mr. Papagni

1747

1 Q. And when you go hunting, you don't wear a hat, is what
2 you're saying?

3 A. Oh, sometimes I would wear a ball cap, or something, yes.

4 Q. And Steve Hammond would wear a white cowboy hat?

5 A. I -- I don't recall that. No.

6 Q. But you recall that Dusty -- or that Rusty Hammond wore the
7 hat you saw in the photograph. Right?

8 A. Well, yeah, it was in the picture.

9 Q. Yeah. So did he wear that -- when?

10 A. Well, whatever date was on the picture.

11 Q. When were you showed that picture, Mr. Taylor?

12 A. I saw that picture a little over a week ago, perhaps.

13 Q. Who showed it to you?

14 A. It was e-mailed to me by Larry Matasar.

15 Q. And did you also get interviewed by a Mr. Freeman?

16 A. Correct. I've been interviewed by Mr. Freeman.

17 Q. And what did Mr. Freeman tell you about what you were going
18 to testify here today?

19 A. He said that there was some speculation as to whether I was
20 deer hunting with Dusty.

21 Q. And when you were asked questions in the grand jury about
22 any of your hunts in 2001, you repeatedly said you didn't
23 recall. Correct?

24 A. Yeah, the way I remember that is he was asking for
25 specifics and for specific years. And, no, I did not recall

Taylor - X - By Mr. Papagni

1748

1 what the specifics were at that time.

2 Q. And do you ever recall being hunting with Dusty Hammond in
3 which there was a group of deer that Steven Hammond shot at?

4 A. No.

5 Q. Steven Hammond, when -- in 2001, drive a green Jeep on
6 occasion, a Willys?

7 A. Yes, I believe around that time period he was driving a
8 green Jeep.

9 Q. And you've been down to the Hammonds' cabin off of Steens
10 Loop Road on several occasions, have you not?

11 A. Yes, I have.

12 Q. And you've used that cabin on occasion, when you've been on
13 hunting trips?

14 A. Yes.

15 Q. And you've hunted the schoolhouse section. Correct?

16 A. Yes. Correct.

17 Q. Have you ever shot at animals off the schoolhouse section,
18 in that general area?

19 A. No, I have not.

20 Q. Have you ever been on a hunt with Steven Hammond, Rusty
21 Hammond, Dusty Hammond, and yourself?

22 Pardon me?

23 A. I don't recall if Steve was there for that specific elk
24 hunt. I know it was Dusty and Rusty and I, because when we
25 walked out the fence line, Rusty and I decided to keep Dusty in

Taylor - X - By Mr. Papagni

1749

1 between us. And so I stopped walking first, allowing them to
2 continue the fence line, and we were going to make a hunt down.

3 And as I recall, I waited for as long as I thought I
4 should, to give them time to scatter out. And just as I
5 crossed the fence, that's when I heard the shot go off. And
6 I thought, Oh, okay, this could be what we were looking for.

7 So I waited for a while. And then I thought, well,
8 I better investigate. So I walked over, and -- and Rusty and
9 Dusty were there. And Dusty's story was when he ducked under
10 the fence, somehow his rifle went off.

11 And I remember that because I remember being really
12 excited that there might be elk there. And for the rest of
13 that hunt -- of course, in my eyes, it was over.

14 Q. And what of that story did you tell a grand jury -- what
15 part of that story did you tell the grand jury back on June
16 17th, 2010? Any of it?

17 A. No, I did not. I didn't put together a time frame. He
18 seemed to be asking me more general questions.

19 Q. He asked you about 2001.

20 A. Yes. And he would say, generally, are there -- did you
21 remember meeting anybody in particular or anybody in general,
22 is how I recall that.

23 Q. Do you remember a Scott Gustafson?

24 A. Yes, I do.

25 Q. Oh. Did you mention that in 2010, when you were in front

Taylor - ReD - By Mr. Matasar

1750

1 of the grand jury, sir?

2 A. I didn't know if that was a hunting trip in 2001.

3 Q. Your memory has just come back in the last couple of weeks?

4 A. Since I realized that I was going to be called here today,
5 yes.

6 Q. But you were called before a grand jury in 2010. Didn't
7 your memory come back then?

8 A. Didn't know what questions he was going to ask me about,
9 sir.

10 Q. You didn't know, when you came to the grand jury -- after
11 you were interviewed by a B.L.M. agent -- what the questions
12 were going to be about?

13 A. I was not interviewed by a B.L.M. agent prior to going to
14 grand jury, that I recall.

15 MR. PAPAGNI: Those are all of my questions.

16 THE COURT: Anything further?

17 MR. MATASAR: Yes, your Honor.

18 Let me have a second here.

19 REDIRECT EXAMINATION

20 BY MR. MATASAR:

21 Q. Mr. Taylor, was part of the way that you refreshed your
22 recollection in reviewing the photographs that you were sent?

23 A. Yes, that helped. I have a hard -- I have -- I don't pay
24 attention to -- I don't keep scores very good. So I don't keep
25 attention to what year this particular, you know, event was.

Gustafson - D - By Mr. Matasar

1751

1 So, yes.

2 Q. You told a grand jury that you didn't recall going deer
3 hunting with Dusty Hammond. Right?

4 A. Yes, I believe that is what I said.

5 Q. And that's what you're saying today too. Right?

6 A. That is what I'm saying today.

7 MR. MATASAR: Okay. Nothing further.

8 MR. BLACKMAN: No other questions.

9 MR. PAPAGNI: No other questions.

10 THE COURT: You may step down.

11 Your next witness, please.

12 MR. MATASAR: Scott Gustafson.

13 THE CLERK: Please raise your right hand.

14 (Witness sworn.)

15 THE WITNESS: Yes.

16 THE CLERK: Thank you.

17 Please have a seat.

18 Please speak clearly into the microphone here, and
19 there's water here, if you would like some.

20 Please state your full name, and then spell your
21 name for the record.

22 THE WITNESS: Scott Gustafson. S C O T T,
23 G U S T A F S O N.

24 DIRECT EXAMINATION

25 BY MR. MATASAR:

Gustafson - D - By Mr. Matasar

1752

1 Q. Mr. Gustafson, how are you employed?

2 A. I'm an insurance agent.

3 Q. Okay. How long have you done that?

4 A. 30 years.

5 Q. Where do you live? What city?

6 A. I live in Canby.

7 Q. And that's where you work out of?

8 A. That's correct.

9 Q. Do you know the Hammonds?

10 A. I do.

11 Q. Tell the juror -- jurors, how you know them and how long
12 you've known them.

13 A. I have known them socially and as friends and as hunting
14 companions for, I'll say, since 1995. Somewhere in that range.

15 Q. Okay. From time to time do you go hunting at their place?

16 A. Yes, I do.

17 Q. Do you recall going hunting in September of 2001?

18 A. Yes, I do.

19 Q. We -- we have -- we seem to have a slight numbering problem
20 here.

21 I would like to show you a photograph which I have
22 as 1213. Sorry.

23 (Pause, referring.)

24 BY MR. MATASAR:

25 Q. Is -- can you describe, first of all, from left to right --

Gustafson - D - By Mr. Matasar

1753

1 from here to right, who's in that photograph?

2 A. From left -- from my left to right, that's me before
3 glasses.

4 Q. Pardon? That's you before the glasses?

5 A. Me before the glasses.

6 My son Tim, and Steve Hammond.

7 Q. Okay. Let me show you what I have as 1214.

8 No, I guess -- well --

9 MR. MATASAR: Your Honor, at some point we're going to
10 make sure that -- it's either Mr. Schroeder or I or the Court
11 may have the numbering system wrong. So we'll make sure at a
12 break.

13 BY MR. MATASAR:

14 Q. But how about this photograph? Do you know who this person
15 is?

16 A. That would be Rusty Hammond.

17 Q. And who is Rusty?

18 A. Rusty is Steve's brother.

19 Q. Okay. Now, do you recall hunting at their place in
20 September of 2001?

21 A. Yes.

22 Q. By the way, is -- how old is your son, compared to Dusty?

23 A. Well, I don't know Dusty's age. But at the time, Tim would
24 have been 15.

25 Q. Okay. Were they the only kids, teenagers at that time,

Gustafson - D - By Mr. Matasar

1754

1 during the hunt? If you recall?

2 A. As far as I can recall, I would say yes.

3 Q. Okay. Do you recall where you stayed the night before you
4 actually went out?

5 A. I believe we stayed at what they call their cabin. And I'm
6 assuming we stayed in our -- my family stayed in our tent.

7 Q. Okay. How many days did you hunt that time?

8 A. I would say two.

9 Q. Okay. So you actually went out two days?

10 A. Two days.

11 Q. And that was a deer hunt?

12 A. It was a deer hunt.

13 Q. Okay. And what do you recall about the first day, going
14 out? Did everybody go out together? Same direction? How did
15 that work?

16 A. Yeah, typically the hunt would start at the cabin. And the
17 hunters -- there would be a group of hunters.

18 We would head off to the north, going through
19 several drainages. And it's a big area. It's a big country.

20 Everybody's feet would get sore, so we would all
21 kind of meet up at a place. And then figure out what we saw,
22 what happened, and then go on to the next hunt.

23 Q. Do you recall that day anybody in your party firing a
24 weapon? Did you hear a weapon fired?

25 A. I -- yes, I had heard a weapon fired.

Gustafson - D - By Mr. Matasar

1755

1 Q. Tell the jurors what you recall about that.

2 A. I was hunting down a ridge, and I heard several shots. And
3 it was distant from me. I'm guessing 600 yards, something like
4 that. So I sat down. I carry binoculars. I put the
5 binoculars up. And I could see deer running up this hillside.
6 And by that point there was probably three or four or five
7 shots. And so I had my binoculars on the deer. I was trying
8 to see if anything was hit. And from what I could tell, from
9 where I was at, there was nothing hit, and everything got away.
10 And it was probably eight -- eight to ten shots.

11 Q. Do you recall where Steve Hammond was at that time?

12 A. I don't, because we hunted in, you know, different
13 directions.

14 Q. What kind of day was it? Do you recall?

15 A. It was a pleasant day. It was sunny, as I recall.

16 Q. Do you recall that day seeing any smoke to the south at any
17 time?

18 A. I do.

19 Q. Okay. What did you see?

20 A. We had all met up in a spot, and we were all congregating,
21 talking about what we had seen. And there was a big smoke
22 plume to the south.

23 There was a helicopter flying around, possibly
24 another aircraft, fixed wing. And so we -- as a group, we're
25 just asking the Hammonds what was going on there. And my

Gustafson - D - By Mr. Matasar

1756

1 recollection is that they said it was controlled burning.

2 That was the smoke we saw. And that was the conversation.

3 Q. Do you recall anybody making a telephone call about burning
4 that day?

5 A. I do.

6 Q. First, tell the jury, if you recall, what kind of telephone
7 that call was made on.

8 A. It was made on a cell phone.

9 And my recollection is as we were -- after we
10 discussed the smoke -- with the Hammonds -- to the south,
11 Steve asked if anybody had a cell phone. And I did carry a
12 cell phone. That was kind of in the early stages of cell
13 phones, but I had one in my fanny pack. So I gave my cell
14 phone to Steve, is my recollection.

15 And I was very close to him. The group was there.
16 And he made a phone call to the B.L.M. And it was a fairly
17 short phone call.

18 Q. What did you hear?

19 A. I heard Steve say, This is Steve Hammond. I wanted to let
20 you know I'll be doing some controlled burning this weekend.
21 And -- and that was it. It was pretty short.

22 Q. Was there any encounter, that you're aware of, between your
23 party -- anybody in your hunting party and another group of
24 hunters at that time?

25 A. Absolutely not.

Gustafson - X - By Mr. Papagni

1757

1 Q. Was there any discussion about any sort of encounter with
2 other hunters, at any time?

3 A. No.

4 Q. Any discussion, before the phone call, about any other
5 hunters?

6 A. None.

7 MR. MATASAR: Okay. That's all I have.

8 Thank you, Mr. Gustafson.

9 MR. BLACKMAN: No questions.

10 CROSS-EXAMINATION

11 BY MR. PAPAGNI:

12 Q. What color of pickup was Dwight Hammond driving that day?

13 A. What kind of pickup?

14 Q. What color of pickup did he drive?

15 A. (Pause.)

16 Q. You can't remember?

17 A. Typically it was a blue pickup, so --

18 Q. And who was in it with him?

19 A. The members of the hunting group -- it's been so long ago,
20 I just don't know.

21 Q. And do you -- does your family own some property with the
22 Hammond family?

23 A. It's not co-owned. It's owned by us.

24 Q. And who pays the taxes on it?

25 A. Who pays the taxes? The Hammonds do.

Gustafson - X - By Mr. Papagni

1758

1 Q. So explain that to me.

2 You own it, but they pay the taxes?

3 A. Back in the mid-'90s, the Hammonds talked to my father and
4 myself, and offered to sell us some property for recreational
5 purposes. We -- they sold it to us for hunting, hiking,
6 fishing, camping, those kinds of things. They kept the right
7 to farm it. And so part of the deal was they pay the taxes,
8 and we had the use of it for recreational purposes.

9 Q. Okay. And you're an insurance agent. Right?

10 A. Yes.

11 Q. Are you the insurance agent for the Hammond Ranches?

12 A. Yes, I am.

13 Q. And is there -- are they one of your largest clients?

14 A. No.

15 Q. Top ten?

16 A. No.

17 Q. Okay. Lot of insurance clients?

18 A. What's that?

19 Q. You have a lot of insurance clients, apparently.

20 A. I do.

21 Q. This shooting of the deer that you described for the
22 jury -- do you recall you describing your binoculars, and
23 stuff?

24 A. Um-hmm.

25 Q. That takes place before or after Mr. Hammond had -- Steven

Gustafson - X - By Mr. Papagni

1759

1 Hammond had made this call from your cell phone?

2 A. That happened after.

3 Q. So you're absolutely certain that this deer shooting
4 incident you've described for the jury came after Steven
5 Hammond got your cell phone and called the B.L.M. to say he was
6 going to do a controlled burn?

7 A. Absolutely certain.

8 Q. And what area were you hunting in -- or what area -- this
9 map behind you -- were you at when this cell phone call was
10 made?

11 A. Okay. Let me orient myself here.

12 Q. That's -- the map's given us a lot of trouble, so if you
13 can just take your time, sir.

14 A. Where is the loop road?

15 Q. Loop road's that yellow one on the very bottom, if I may
16 help you there, sir.

17 A. This one (pointing)?

18 Q. Yeah.

19 A. Hammond. So -- so tell me the question, again.

20 Q. Where were you at when he made the phone call?

21 A. Would have been somewhere up in here, I believe (pointing).

22 Q. Okay. I'm going to hand you a blue pen, and I want to have
23 you write down where you were at.

24 A. Okay.

25 MR. BLACKMAN: Your Honor, I don't mean to interrupt

Gustafson - X - By Mr. Papagni

1760

1 his examination but, at least for my purposes, I think there's
2 probably a better map for -- for this than one of these from
3 the '06.

4 MR. PAPAGNI: I can change --

5 MR. BLACKMAN: It seems to me it's an inappropriate
6 use of an exhibit. There must be one from '01 that might be
7 more useful. That's all I'm suggesting.

8 BY MR. PAPAGNI:

9 Q. Let me ask you this question.

10 Are you able to find where you were at, when
11 Mr. Steven Hammond made this call about 11 years ago, on the
12 map in front of you, sir?

13 A. Am I able to find it?

14 Q. Yeah.

15 A. Not specifically. It is a little bit of a confusing map.

16 Q. Okay. Well, I can get you another one.

17 Would it be easier if you had another one?

18 A. Well, let me just look at the roads here.

19 Q. Moon Hill Road would be to your right.

20 And then I'm going to ask you to give us the number
21 of the exhibit to the left, when you're ready.

22 A. Yeah. We would have been right up -- right up in here
23 (pointing).

24 Q. Okay. If you would just go ahead and write your name where
25 you believe you were on that map, please, sir, when the call

Gustafson - X - By Mr. Papagni

1761

1 was made.

2 A. (Complies.)

3 Q. That marking there pretty good?

4 A. Pretty good.

5 Q. And in the left-hand corner up there, that little yellow
6 sticker, what's the number?

7 A. Exhibit 070.

8 Q. And the date that you made this call in 2001?

9 A. Well, I have to believe it's the same day.

10 Q. Well, what day? September --

11 A. September 30th.

12 Q. October?

13 Pardon me?

14 A. The opening day of hunting season, whatever that is.

15 Q. The opening day of hunting season.

16 A. Um-hmm. (Nods head.)

17 Q. Would that have been September 29th, is the opening day?

18 A. I don't know.

19 Q. So your recollection is that everything you're testifying
20 about took place on the opening day of hunting season?

21 A. Correct. (Nods head.)

22 Q. If I told you the opening day was September 29th, 2001,
23 sir, would you dispute that? Would that be fair?

24 A. Well, it was 11 years ago. I have no clue of the date.

25 Q. Okay.

Colloquy

1762

1 A. So you could tell me it was September 15th, and I would
2 agree with you.

3 Q. That's probably -- was it a Saturday? Do you remember?

4 A. It was a Saturday.

5 Q. You're certain it was a Saturday?

6 A. Yep. (Nods head.)

7 Q. Just as sure as you're certain that the shots you heard
8 about the deer came after the telephone call was made?

9 A. I'm sure it was opening season, opening day of deer season.

10 MR. PAPAGNI: Thank you, sir. Those are all of my
11 questions.

12 MR. MATASAR: No questions.

13 THE COURT: Thank you, sir. You may step down.

14 Your next witness, please.

15 MR. BLACKMAN: Jody Starbuck.

16 And, your Honor, I think I -- we're having some
17 technical issues here. So I --

18 MR. MATASAR: May these witnesses be excused?

19 MR. PAPAGNI: No objection.

20 MR. BLACKMAN: I need to play the audio off my laptop,
21 which I don't think is connected to the system at the moment.

22 Do we know if I can simply plug in the audio? I
23 don't need any video.

24 THE COURT: Why don't you just put it up next to the
25 microphone.

Starbuck - D - By Mr. Blackman

1763

1 MR. BLACKMAN: Do you think that will work?

2 THE COURT: Don't know.

3 MR. BLACKMAN: Oh, well, we can try it.

4 THE COURT: I'm just a lawyer.

5 (Pause.)

6 THE CLERK: Please raise your right hand.

7 (Witness sworn.)

8 THE WITNESS: Yes, I do.

9 THE CLERK: Thank you.

10 Please have a seat.

11 Please speak clearly into the microphone, and
12 there's water here, if you would like some.

13 Please state your full name and then spell your name
14 for the record.

15 THE WITNESS: Jody Starbuck. J O D Y,
16 S T A R B U C K.

17 MR. BLACKMAN: And, your Honor, I won't be using this
18 diagram, so I would ask that it just be taken down.

19 THE COURT: Thank you.

20 DIRECT EXAMINATION

21 BY MR. BLACKMAN:

22 Q. Ms. Starbuck, where do you live?

23 A. I live in Diamond, Oregon, on the Hammond ranch.

24 Q. How long have you lived in that area?

25 A. I was born and raised in Crane, but have lived in

Starbuck - D - By Mr. Blackman

1764

1 Frenchglen the last six years.

2 Q. What do you do for a living?

3 A. I'm a registered nurse at Harney District Hospital, in
4 Burns.

5 Q. Okay. Can you talk up just a little bit. I'm having
6 trouble hearing you.

7 So what do you do for a living?

8 THE COURT: Might move it a little closer. Might
9 help.

10 THE WITNESS: I'm a registered nurse.

11 BY MR. BLACKMAN:

12 Q. How long have you been doing that?

13 A. Five years.

14 Q. Have you worked as a firefighter at any time during your
15 life?

16 A. Yes, I have. I worked three summers during my college --
17 to get me through college.

18 Q. Are you currently married?

19 A. Yes.

20 Q. How long have you been married?

21 A. Six years.

22 Q. Were you married in '06?

23 A. Yes.

24 Q. And what's the name of your husband?

25 A. Wade.

Starbuck - D - By Mr. Blackman

1765

1 Q. Directing your attention to the summer of '06, did you and
2 Wade have any kind of a job that took you down into the
3 Frenchglen area?

4 A. Yes. We were working for Gary Miller, in Frenchglen, and
5 we were cutting hay on the refuge.

6 Q. Okay. So could you explain to the jury, just briefly, what
7 does that mean, that you were cutting hay?

8 A. There's meadow hay at the refuge. And we cut it, and put
9 it into bales.

10 Q. Now, I'm going to direct your attention to a particular day
11 in August of 2006. And I'm going to ask you, without telling
12 you the date, if there was a date when something unusual
13 occurred while you and -- and Wade were cutting hay for
14 Mr. Miller.

15 A. I couldn't tell you the date exactly.

16 Q. I understand you can't tell me the date. But was there
17 something that struck you -- not to use a pun, but did
18 something happen that caused you to take some action?

19 A. Yes.

20 Q. Okay. What happened?

21 A. We were finishing our day of cutting, and there was
22 numerous lightning strikes throughout that day. And I watched
23 a strike hit the ground, start a fire.

24 Q. Okay. And once you saw that stroke hit the ground and
25 start a fire, what did you do?

Starbuck - D - By Mr. Blackman

1766

1 A. I called B.L.M. dispatch.

2 Q. Okay. And I'm going to play for you a recording, and I
3 hope you can hear it. And ask you if you can identify the
4 recording and who's talking. Okay?

5 A. Okay.

6 Q. Let's give it a shot.

7 It's not playing, but let me give it a try.

8 (Pause, referring.)

9 MR. BLACKMAN: That's it. Sorry.

10 (Audio playing.)

11 BY MR. BLACKMAN:

12 Q. I'll stop it. Can you hear it now?

13 A. Yes.

14 (Audio playing.)

15 (Audio concluded.)

16 BY MR. BLACKMAN:

17 Q. So was that the call you made to B.L.M. when you first saw
18 fire?

19 A. Yes.

20 Q. Okay. And what did you do after you first saw the fire?

21 A. After we called the B.L.M., we just continued there in that
22 field for about an hour.

23 We were fueling up our swathers and greasing, and we
24 just continued to watch it while we were in the field.

25 Q. And what did you see, as you were watching the fire?

Starbuck - D - By Mr. Blackman

1767

1 A. It continued to grow, moving uphill.

2 Q. And "uphill," you mean moving to the east?

3 A. Correct.

4 Q. Okay. So what did you do when you saw that happen? Do you
5 recall calling the B.L.M. a second time?

6 A. No.

7 Q. Okay. Let me play you a second call, and see if you can
8 recognize yourself calling the B.L.M.

9 (Pause, audio playing.)

10 (Audio concluded.)

11 BY MR. BLACKMAN:

12 Q. So, Ms. Starbuck, can you estimate what time of day it was
13 that you made those calls?

14 A. I believe the first call I made was approximately after
15 four o'clock. And we stayed in the field for maybe an hour.
16 And I believe that call was a call back to me. So we were
17 probably -- after 4:00. We were gone by the field by 5:30.

18 Q. Okay. So the -- the call back to you would have been --
19 what? An hour later?

20 A. No. Maybe 15, 20 minutes.

21 Q. And then did you continue to observe the fire that
22 afternoon?

23 A. Yeah.

24 Q. And how would you describe its appearance?

25 A. It was actively growing.

Starbuck - X - By Mr. Papagni

1768

1 Q. Did you see any kind of fire suppression activity while you
2 were there?

3 A. No.

4 MR. BLACKMAN: That's all I have, your Honor.

5 Thank you.

6 THE COURT: Mr. Matasar?

7 MR. MATASAR: No questions, your Honor.

8 THE COURT: Mr. Papagni.

9 MR. PAPAGNI: Just a couple.

10 CROSS-EXAMINATION

11 BY MR. PAPAGNI:

12 Q. Ma'am, you were a firefighter, and then you became a nurse?

13 A. Correct.

14 Q. Okay. And the events you're talking about took place the
15 day there was a lot of lightning hitting in the area?

16 A. Yes.

17 Q. And that's the way you recall the date. Correct?

18 A. Yes.

19 Q. And so based upon all of this lightning that was hit --
20 that was going on, you saw a fire start south of Bridge Creek
21 but north of the loop road. Right?

22 A. Correct.

23 Q. And then it grew?

24 A. (Nods head.)

25 Q. True?

Manski - D - By Mr. Blackman

1769

1 A. Yep.

2 MR. PAPAGNI: Thank you. Those are all of my
3 questions.

4 THE COURT: Thank you. You may step down.

5 Your next witness, please.

6 MR. BLACKMAN: Jonathan Manski.

7 THE COURT: Thank you.

8 MR. BLACKMAN: Your Honor, I'm going to have this one
9 just look at Exhibits 1431 and 1432.

10 THE CLERK: Please raise your right hand.

11 I'm sorry.

12 MR. BLACKMAN: Go ahead.

13 THE CLERK: Please raise your right hand.

14 (Witness sworn.)

15 THE WITNESS: I do.

16 THE CLERK: Thank you. Please have a seat.

17 Please speak clearly into the microphone, and
18 there's water if you would like some.

19 THE WITNESS: Okay.

20 THE CLERK: Please state your full name, and spell
21 your name for the record.

22 THE WITNESS: My name's Jonathan Manski.

23 J O N A T H A N. Manski, M A N S K I.

24 DIRECT EXAMINATION

25 BY MR. BLACKMAN:

Manski - D - By Mr. Blackman

1770

1 Q. Mr. Manski, can you tell us what you do for a living.

2 A. Currently, I'm the unit aviation officer for the B.L.M. in
3 Southeast Oregon.

4 Q. How long have you worked with the B.L.M?

5 A. Since 1989.

6 Q. What was your position back in 2006?

7 A. I was the dispatch center manager.

8 Q. And what is the dispatch center manager's job?

9 A. It's an overall coordination job. Taking care of whatever
10 the incidents -- all risk incidents that may occur within the
11 jurisdiction of our district.

12 Q. What's a red flag warning?

13 A. A red flag warning is a notice that is issued by the
14 National Weather Service of an indication of severe weather
15 conditions.

16 Q. And as the manager position that you held in 2006, did that
17 kind of information come to you?

18 A. It would come to the dispatch center, and it would be
19 brought to my attention, certainly, because it's a matter of
20 importance that would be passed on to firefighters or folks --
21 you know, when those are issued, they have to be reported to
22 the folks in the field.

23 Q. Thank you.

24 MR. BLACKMAN: I would ask the clerk to show you
25 Exhibit 1431.

Manski - D - By Mr. Blackman

1771

1 I believe, Counsel, you have a copy of 1431.

2 MR. PAPAGNI: I do. Thank you.

3 (Witness handed document.)

4 BY MR. BLACKMAN:

5 Q. Drawing your attention to Exhibit 1431, first of all, do
6 you recognize what that is generally?

7 A. Yes. It's a standard red flag warning issued by the
8 National Weather Service.

9 MR. BLACKMAN: Your Honor, I would offer Exhibit 1431.

10 MR. PAPAGNI: No objection.

11 THE COURT: 1431 is received.

12 BY MR. BLACKMAN:

13 Q. And, Mr. Manski, could you tell us if this is in fact a red
14 flag warning?

15 A. It is a red flag warning because that's the header of the
16 information here, "red flag warning."

17 Q. And if you would turn to the second page of that exhibit,
18 1431, and look at the box that's been blocked in red.

19 Could you tell us if that indicates the period of
20 time that this red flag warning was in effect?

21 A. There is a date and time on the -- within the red box, that
22 you indicate, that indicates the date and time that it was
23 issued.

24 Q. Okay. And when was it in effect?

25 A. You want me to read from here? Is that what you're asking

Manski - D - By Mr. Blackman

1772

1 me --

2 Q. Yes. I'm just put it on the ELMO.

3 MR. BLACKMAN: Is the ELMO up?

4 MS. ROOT: Yeah. (Nods head.)

5 BY MR. BLACKMAN:

6 Q. Give it one second. It will shift, I think.

7 Okay. What is the effective time for this
8 particular red flag warning? And let me just give it a
9 second.

10 There's a way of making this focus.

11 A. Okay. Not for me, it's not. So, you know, I can read it
12 here better than I can read it there. Is that okay with you?

13 Q. I'm not sure why that's happening. But, anyway.

14 So when was it in effect?

15 A. This says it was in effect at 08:03 a.m. on Pacific
16 Daylight Time, Tuesday, August 22nd, 2006.

17 Q. And until what hour was it in effect?

18 A. The next paragraph says the red flag warning remains in
19 effect from noon, mountain time -- which would be 11:00 o'clock
20 Pacific Time -- for the day -- through midnight Mountain Time,
21 or 11:00 p.m. Pacific Daylight Time.

22 Q. And what is a red flag warning?

23 A. Are you asking me that again, because I think I've already
24 answered that.

25 Q. What weather conditions are attached to a red flag warning?

Manski - D - By Mr. Blackman

1773

1 A. This particular red flag warning, as it states in this
2 issuance, has to do with gusty winds and low humidity, which
3 are a couple of the criteria that the National Weather Service
4 uses to issue red flag warnings --

5 Q. Now, in your position as the EICC center manager, did you,
6 after the Grandad fire in 2006, have occasion to submit a
7 report about the resources and events surrounding the fire
8 activity in the Burns district during August of 2006?

9 A. I wrote a summary report of some of the activity, yes. I'm
10 not sure if that's what you're looking at, or what?

11 I guess I didn't see it.

12 Q. I'll have the clerk show you 1432.

13 (Witness handed document.)

14 MR. PAPAGNI: Thank you. (Handed document.)

15 THE WITNESS: Yes, this is my report.

16 BY MR. BLACKMAN:

17 Q. So you did a report sometime after August of 2006,
18 summarizing the fire activity in the Burns district. Is that
19 right?

20 A. It summarizes not only the fires occurring on the Burns
21 district, but the, you know, general situation nationally,
22 regionally; as well as some of the critical issues that were
23 going on during the fire season in August of 2006.

24 MR. BLACKMAN: Your Honor, I would offer 1432.

25 MR. PAPAGNI: No objection.

Manski - D - By Mr. Blackman

1774

1 THE COURT: Received.

2 BY MR. BLACKMAN:

3 Q. And, Mr. Manski, as part of that report, did you
4 summarize -- and, again, it's hard to read in here.

5 But did you summarize the -- why is it not --
6 (Pause, referring.)

7 MR. BLACKMAN: Just doesn't want to focus for me, your
8 Honor. Well, what can I say?

9 BY MR. BLACKMAN:

10 Q. Does it in fact summarize the fire activity for August
11 21st, 22nd, 23rd, 24th?

12 A. No. What it actually says is August 19th, 20th, 21st,
13 22nd, 23rd, and 26th. If I'm reading in the red box. Is that
14 what you're asking?

15 Q. No, that -- no. I'm talking about the upper part, first.
16 The general --

17 A. The general fire situation, yes, it does.

18 Q. So how many fires -- how many new fires occurred in this --
19 not nationally but in your region, on August 22nd, of -- excuse
20 me, August 21st of 2006?

21 A. This information would have come from the regional
22 situation report, reflecting the fire activity from the entire
23 region of Oregon and Washington, Region 6.

24 This says there were -- on August 21st, there were
25 52 new fires in Region 6. And new and existing fires that

Manski - D - By Mr. Blackman

1775

1 day burned 8,226 acres.

2 Q. And how many fires on the 22nd, just in the Region 6, which
3 is Oregon and Washington?

4 A. Okay. It says, there were 88 new fires on August 22nd
5 within Oregon and Washington. And those new and existing fires
6 burned an additional 33,167 acres.

7 Q. And the 23rd?

8 A. The 23rd said, 28 new fires in Region 6, and those new and
9 existing fires burned 75,444 acres that day.

10 Q. Now, turning to the red box.

11 Does that summarize what the weather situation was
12 during that same period of time?

13 A. It says that during that period of time, the National
14 Weather Service issued numerous red flag warnings for the area
15 in our fire zone, yes.

16 Q. And what dates does it indicate there were red flag
17 warnings in effect through the National Weather Service in the
18 Burns district?

19 A. For our zone, they -- this says that they were issued on
20 August 19th, 20th, 21st, 22nd, 23rd, and 26th.

21 MR. BLACKMAN: Thank you, your Honor.

22 No other questions.

23 THE COURT: Mr. Matasar?

24 MR. MATASAR: No questions.

25 THE COURT: Mr. Papagni.

Manski - X - By Mr. Papagni

1776

CROSS-EXAMINATION

BY MR. PAPAGNI:

Q. Mr. Manski, during a fire season, a red flag warning is issued fairly regularly?

A. During an active fire season, there are numerous red flag warnings, that is correct.

Q. In fact most of the firefighting is done during that period of time. Is that true?

A. Most of the active firefighting is done -- if the conditions are such that doesn't promote active fire activity, then, you know, those fires are easily caught, and it's --

Q. One of your jobs is to go ahead and put out the weather warnings to assist firefighters in the field, is it not?

A. It's a requirement for a safety aspect, so firefighters are aware of, you know, fire conditions and as they change.

Q. And -- and these red flag warnings -- for example, Defendant's Exhibit 1431, which you had to look at --

A. Yes, sir.

Q. -- do these red flag warnings sometimes get cancelled or rescinded, sir?

A. They're issued by the National Weather Service for a period of time. When the conditions change and the -- and the red flag warning criteria are no longer met, they cancel the red flag warning, yes.

Q. In fact on 1431, that was cancelled at 6:17 p.m., wasn't

Manski - X - By Mr. Papagni

1777

1 it, on --

2 A. This red flag warning was cancelled at 6:17 in the evening
3 of the 22nd. That's correct.

4 Q. So despite what it says on the second page, the fact of the
5 matter is it was cancelled at 6:17 p.m., that day?

6 A. It says on the second page it would be in effect until
7 midnight, because that was issued at 8:00 in the morning.

8 As those conditions change throughout the day, the
9 National Weather Service would certainly update that
10 information and cancel it as it was deemed necessary.

11 Q. And this one was cancelled. Correct?

12 A. This one had been cancelled. That's correct.

13 Q. And it was cancelled at 6:17 p.m?

14 A. 6:17 Pacific Time by the National Weather Service.

15 Q. And the other exhibit that was shown you -- it got marked
16 1432 -- that talked about some other days: The 19th, 20th,
17 21st.

18 We already dealt with the 22nd. So the other
19 relevant day would be the 23rd of August, for our purposes.

20 Was the red flag warning on the 23rd also cancelled
21 later in the day?

22 A. Yes, it was. It was mid-afternoon. I don't recollect the
23 exact time that it happened, but it was early afternoon on the
24 23rd.

25 Q. And when it's cancelled, why is it cancelled, sir?

Manski - X - By Mr. Papagni

1778

1 A. The National Weather Service, using their instruments and
2 technology and -- and technical knowledge realized that the
3 conditions that generated the red flag warning -- for example,
4 extreme winds or high winds, low humidities, that those
5 conditions were changing and subsiding to where they would not
6 meet the minimum criteria for -- for issuance of a red flag
7 warning. And they would have a certainty that they would not
8 return.

9 Q. But the two documents, Defendant's Exhibits 1431 and 1432,
10 don't include those cancellations in them, do they?

11 A. No, they don't. They just -- it's just the original
12 product that was developed at 8:00 in the morning. And no
13 further issue -- you know, the issuance that would have
14 cancelled this was not included in this.

15 MR. PAPAGNI: Those are all of my questions.

16 MR. BLACKMAN: No other questions.

17 THE COURT: Thank you. You may step down.

18 Your next witness, please.

19 MR. BLACKMAN: Henry Vogler.

20 MR. PAPAGNI: May Mr. Manski be excused, your Honor?

21 THE COURT: Yes.

22 MR. PAPAGNI: Thank you.

23 THE CLERK: Please raise your right hand.

24 (Witness sworn.)

25 THE WITNESS: So help me God.

Vogler - D - By Mr. Blackman

1779

1 THE CLERK: Thank you. Please have a seat.

2 Please speak clearly into the microphone, and here's
3 water, if you would like some.

4 THE WITNESS: Thank you.

5 THE CLERK: Please state your full name and spell your
6 name for the record.

7 THE WITNESS: Henry Conrad, V, as in Victor,
8 O G L E R, IV.

9 DIRECT EXAMINATION

10 BY MR. BLACKMAN:

11 Q. Mr. Vogler, please speak up. Okay? Speak right into that
12 microphone. Okay?

13 A. Oh, sorry.

14 Q. Mr. Vogler, what do you do for a living?

15 A. I'm a stockman.

16 Q. How long have you been a stockman?

17 A. Since I graduated from college in 1971.

18 Q. Where did you go to school?

19 A. University of Nevada, at Reno.

20 Q. What kind of livestock have you raised over the years?

21 A. Cattle and sheep and horses.

22 Q. Where do you currently reside?

23 A. North Spring Valley, Nevada.

24 Q. And how long have you lived in Nevada?

25 A. This is my 28th year.

Vogler - D - By Mr. Blackman

1780

1 Q. Okay. Before living in Nevada, where did you live?

2 A. In Harney Valley.

3 Q. That's here in Oregon?

4 A. That's in -- out at Burns, south and east of Burns.

5 Q. And is that where you were born and grew up?

6 A. No. I was born right here in Pendleton.

7 Q. Okay. And so when did you move to the Burns area?

8 A. I was about a year old. I don't have much recollection.

9 Q. So you can claim Pendleton as your birthplace, but you
10 really didn't grow up here?

11 A. Well, I'm not sure. We drove out there yesterday, and it's
12 a state hospital now.

13 (Laughter.)

14 BY MR. BLACKMAN:

15 Q. So you grew up in Burns?

16 A. Yes.

17 Q. Do you know the -- Dwight Hammond?

18 A. Yes, I do.

19 Q. How long have you known Dwight Hammond?

20 A. Since the mid-'70s, when I came back to Harney County, out
21 of college.

22 Q. And how long did you live in Harney County at that point?

23 A. Well, from 1950 to 1975. Would be 25 years.

24 Q. And how long have you kept in touch with the Hammond
25 family?

Vogler - D - By Mr. Blackman

1781

1 A. My whole -- whole life. I mean, they're friends.

2 Q. Now, since you lived in Nevada, have you held any positions
3 with any organizations or with the state?

4 A. Oh, boy. I've been a state tax commissioner for seven
5 years. Resource advisory council for the northeast RAC, for
6 the Bureau of Land Management. Coordinated resource management
7 for the White Pine district, B.L.M./Forest Service combination.

8 I've been president of the wool growers, Public
9 Lands Council, N-4 Grazing Board.

10 All of that and 50 cents will get you coffee
11 anywhere but Starbucks.

12 (Laughter.)

13 BY MR. BLACKMAN:

14 Q. Now, I want to direct your attention to August of 2006.

15 And you've been asked to think about this, haven't
16 you?

17 A. Yeah. Yes.

18 Q. Where were you living in August of 2006?

19 A. North Spring Valley, Nevada.

20 Q. And was there an occasion that brought you to Oregon?

21 A. Yes.

22 Q. And what was that?

23 A. A good Irish wedding in Ontario, Oregon.

24 Q. Do you recall when that wedding took place?

25 A. It had been on a Saturday. It was pretty close to the

Vogler - D - By Mr. Blackman

1782

1 middle of the month. I -- whatever the calendar said. But
2 I -- I -- I think it must have been the 18th or 19th. It was
3 on a Saturday, I know that.

4 Q. Did you make any arrangements to visit with the Hammond
5 family since you were going to be in Oregon?

6 A. Yes.

7 Q. Tell us how that -- those arrangements got made.

8 A. Well, my daughter, Kiki, met me in the Burns parking lot
9 Sunday, which was the day after the wedding.

10 And we visited there, and then we went to the
11 Hammonds's sometime Sunday afternoon.

12 Q. Now, Kiki is your daughter, I think you said?

13 A. My second daughter.

14 Q. And she lives in Klamath Falls?

15 A. Yes. She's a parole and probation supervisor for Southeast
16 Oregon, for the Oregon Department of Correction.

17 Q. And her daughter's name is?

18 A. Racine.

19 Q. How old was Racine at the time, about?

20 A. Six years ago, she would have been 11.

21 Q. Who else was with you at that time?

22 A. My son, Stenson Robert.

23 Q. Anyone else?

24 A. Dana.

25 Q. Anyone else?

Vogler - D - By Mr. Blackman

1 A. Dana Vogler.

2 Q. Okay. Your now wife?

3 A. Yes.

4 Q. So do you recall about the time it was that you and Dana
5 and Stenson and Racine got to the Hammonds'?

6 A. It would have been late in the afternoon. Because I took
7 the Wilber family to breakfast in Ontario at -- I think it's a
8 Denny's, or one of those kind of fast restaurants. And -- and
9 then we visited and -- you know, I have a lot of roots that are
10 still in Oregon.

11 And then we took off from Ontario to Burns. It's
12 probably three, four -- three and a half hours. So I would
13 say it's -- probably picked her up sometime in the afternoon;
14 2:00, 3:00, maybe four o'clock. I don't wear a watch.

15 Q. Right. And how long does it take to get from Burns to the
16 Hammond ranch?

17 A. Typical Eastern Oregon road. You know, crooked and
18 potholes named after presidents. So -- it's crooked.
19 Probably -- I believe it's 60 miles, probably, to the dust
20 bowl. Probably an hour and a half.

21 Q. And when you say "the dust bowl," is that the general
22 vicinity of where the Hammond residence is on their ranch?

23 A. Yes. That was what -- I know Ben Kerns used to have it,
24 and they always called it the dust bowl.

25 Q. What was your plan for the visit to the Hammonds?

Vogler - D - By Mr. Blackman

1784

1 A. To say howdy, and get back to my business. (Laughing.)

2 Q. Is that how it worked out?

3 A. No. I had a mutiny. Everybody told me I shouldn't get
4 home so quick. I should give them a little vacation. So we
5 stayed. Monday.

6 Q. And so on Monday, of that visit, you stayed. And what were
7 the kids doing?

8 A. Some time in the early afternoon we decided to go up to the
9 Hammond reservoir, and take the kids swimming and fishing and
10 visiting.

11 MR. BLACKMAN: I'd ask to show the witness Exhibit
12 1124, page 27.

13 BY MR. BLACKMAN:

14 Q. Oh, I should ask you.

15 While you were visiting the Hammonds, did you take a
16 bunch of pictures?

17 A. Yes.

18 Q. And are these the pictures you took when --

19 A. Yes.

20 Q. When you were visiting the Hammonds?

21 A. Yes. That's my son Stenson, holding up whatever that is.
22 And that's my granddaughter Racine, standing next to him.

23 Q. Okay. And so what time of day would you guess it was that
24 the kids were up at the reservoir?

25 A. Be early afternoon.

Vogler - D - By Mr. Blackman

1785

1 Q. And who was up at the reservoir? And what adults went up
2 to the reservoir?

3 A. Dwight and Susie and some of Steve's kids.

4 Q. How about Steve?

5 A. No, he -- roll those other pictures there. There might
6 even be a picture of him in that tractor. He was out, working
7 in the hay field, where all of the antelope, and the stuff was
8 at. He was in the tractor.

9 Q. Do you recall how long the kids stayed in the water?

10 A. Yes. (Laughing.)

11 Q. What -- what is it that -- that makes you recall how long
12 the kids were in the water?

13 A. Well, a big old lightning bolt hit just the other side of
14 the lake. And Ms. Hammond said, Okay, kids, there's a rule
15 here. Three strikes and you're out.

16 She no more than said that, then boom, boom, twice
17 more. We loaded up and went back to the house.

18 Q. Now, when you say there was a lightning bolt, what
19 direction from the reservoir did that lightning hit?

20 A. East, on -- on the mountain itself.

21 Q. Okay. And do you know what that area is called up there?

22 A. Steens Mountain.

23 Q. When you went back down to the house, what did you guys do?

24 A. Told wild west stories, visited, and talked about this guy
25 or that guy, or who tipped over last year, and things like --

Vogler - D - By Mr. Blackman

1786

1 you know, just what people that haven't seen each other for a
2 while talk about.

3 Q. And what did you guys do for dinner?

4 A. We ate right there, and some people came over that wanted
5 to meet me, I guess. They -- I write stories for the
6 *Progressive Rancher*, and *Range Magazine*, and then I am on a
7 radio show, too. And so they wanted to meet me.

8 Again, that and 50 cents will get you coffee.

9 Q. But I would ask you to look at page 41 of that exhibit.

10 Okay. Is that a picture that you took that evening?

11 A. Yes.

12 Q. And that's who?

13 A. Emery and Dwight.

14 Q. Okay.

15 A. He's pretty short in the britches in those days.

16 Q. And was Mr. Hammond there all evening?

17 A. Yep.

18 Q. How about page 46, please.

19 Not too clear on that screen.

20 But is that also at dinner?

21 A. Yes. That would be Dwight, setting next to my son, I
22 believe. And that's my daughter [sic] Racine, standing up.

23 The two little shavers there, I believe, are Steve's
24 kids. And that might be Corbin at the end.

25 Q. Okay. And is Steve Hammond in that picture?

Vogler - D - By Mr. Blackman

1787

1 A. Boy, if he is, I can't see him. But I know he was there.

2 He -- he and Earlyn were both there.

3 Q. Yeah. It's just not very bright. But if you -- maybe I

4 should just ask you to look at the actual photograph.

5 A. If they're not in the picture, they're in the room. But I

6 see a plaid shirt over on the left. That could be -- oh, I see

7 an arm now, too.

8 Maybe I ought to put my seeing eye dog on.

9 (Retrieving eyeglasses.)

10 THE WITNESS: Yeah, that's -- now I can see him.

11 That's Steve on the left, right behind Emery.

12 BY MR. BLACKMAN:

13 Q. So he was there that evening?

14 A. Yes, sir.

15 Q. Now, did you -- when you sent those pictures to us, tell us

16 if there was a clock in one of the pictures that showed the

17 date.

18 A. Ah, Susie was standing in her kitchen, I believe. Either

19 the morning we left or the morning we went up to the reservoir.

20 Q. Okay. Well, I'm going to ask you to look at page 31 of

21 this series of photos you took.

22 A. (Pause, referring.) Yep, there it is. See the clock right

23 back there?

24 Q. Right.

25 A. See the gray outline?

Vogler - D - By Mr. Blackman

1788

1 Q. Okay. That's the clock.

2 And is that at dinner that night?

3 A. Well, I think Susie's drinking orange juice. It would be a
4 little early in the day. It's probably in the morning.

5 Q. Okay. And we made another picture, 1124A.

6 A. There it is.

7 Q. Is that that clock?

8 A. Yes.

9 Q. And can you tell, looking at that clock, what date it was?

10 A. Is it 6-21? Or 8-21. And it's --

11 Q. 8-21?

12 A. And it's 6:15.

13 Q. P.m., right?

14 A. I -- yeah.

15 Q. So how late did you guys stay up that night?

16 A. Hadn't seen each other for a long time. Probably stayed up
17 way longer than we should have.

18 Q. Okay. And then you spent the night there?

19 A. Yes.

20 Q. What about the next morning? What time did you get up the
21 next morning?

22 A. Oh, after staying up all night, I don't suppose very early.
23 It was probably 6:00, 6:30, when we had breakfast.

24 Q. And who all was there when you had breakfast?

25 A. Same crew that was there the night before, except the

Vogler - D - By Mr. Blackman

1789

1 people that -- the visitors. Steve, Earlyn, and all of their
2 kids, and Dwight and Susie.

3 Q. Do you have any recollection of the time that you left the
4 place that day?

5 A. It would have to have been 7:30 or eight o'clock.

6 Q. And were both Steve and Dwight Hammond there at the time?

7 A. Shook hands as I got in the car.

8 Q. And what did you see them do as you were getting ready to
9 go?

10 A. Went over to the shop. I think they had a couple of bad
11 tires on the truck. On their cattle truck.

12 And Steve had walked back and forth to the shop two
13 or three times.

14 Q. So when you left the ranch, they were both there?

15 A. Yes, sir.

16 Q. And then where did you go from there?

17 A. We went back out to where -- well, it was the old Witzel
18 place, they used to live there, on the road. And we went
19 south. I think they might call it Ten Mile now. And we headed
20 south, towards Frenchglen.

21 Q. As you're driving south, through Frenchglen, what do you
22 notice, if anything?

23 A. Smoke.

24 Q. Now, you lived in that area a long time. You've been a
25 stockman for a long time.

Vogler - D - By Mr. Blackman

1790

1 What kind of weather conditions did you think you
2 were seeing when you drove by?

3 A. Well, it's Steens Mountains. They're nine or 10,000 feet
4 high. There's a temperature inversion, especially that late in
5 the year. All that dust bowl, and every little hole -- the air
6 was hanging right there, thick. And you could smell smoke when
7 we left the Hammonds.

8 Q. And what did you see in terms of the conditions -- either
9 smoke or fire -- as you're getting closer to Frenchglen?

10 A. Well, at first, as you're going along that road early in
11 the morning, with the temperature inversion still there, that
12 smoke is just hanging in every little draw.

13 So it wasn't until we got right straight across from
14 Frenchglen -- which I believe that's called Bridge Creek.
15 And you could then see flames. And we called Susie.

16 Q. Do you have any idea what time of day that was?

17 A. Oh, must have been 9:00 -- well, just depends. Again,
18 Eastern Oregon does not get any highway funding since I've been
19 here. Big potholes. And it's crooked.

20 Q. So did something else, hopefully, unusual happen to you
21 during that morning, as you're driving back to Heely -- or
22 Nevada?

23 A. We saw this lady in the B.L.M. truck going by like she was
24 on fire. And we drove up Long Hollow, and drove right into a
25 fire. Drove -- I mean, there was fire on both sides. There

Vogler - D - By Mr. Blackman

1791

1 was fire all the way along there.

2 And -- and we had -- you know, once -- Long Hollow,
3 once you start up Long Hollow, there's no place to turn
4 around.

5 So when we broke out on top, we could only do one
6 thing, is make a quick decision and go.

7 And then we got over the hill and got to Fields. We
8 stopped and visited with an old friend of mine that used to
9 work for Caterpillar, Johnny Hodges. And Johnny Hodges was
10 setting in Ed Davis's water truck. And all behind Fields was
11 on fire.

12 Q. And then you keep driving. And then does something happen
13 when you cross into Nevada?

14 A. Yeah, I got a speeding ticket.

15 Q. I would ask you to look at Exhibit 1136.

16 Do you recognize that ticket?

17 A. Well, yes. He was pretty charitable to me, I believe.

18 What time was it? I -- looking for the --

19 Q. 9:40 in the morning.

20 A. 9:40. That would be about right.

21 Q. So you -- and that ticket was issued -- where were you, in
22 terms of in Oregon and Nevada? Where?

23 A. Well, just after you go out of Denio, you go up over that
24 Kings River Summit, and you can see all the way to Paradise
25 Hill, about 75 miles of straight road.

Vogler - X - By Mr. Papagni

1792

1 Q. Okay. So you were -- what? Just entering Nevada about
2 when this --

3 A. Probably ten miles in.

4 MR. BLACKMAN: All right. No other questions, your
5 Honor.

6 THE WITNESS: He's got my birthday wrong. It says I
7 was born in 40. I was born in 49.

8 MR. BLACKMAN: Duly noted.

9 THE WITNESS: Wonder if I could get that ticket
10 brought back.

11 CROSS-EXAMINATION

12 BY MR. PAPAGNI:

13 Q. Only question I have, sir, is you left the Hammond
14 residence, it's your testimony, on August 22nd, between 7:30
15 a.m. and 8:00 a.m. Right?

16 A. I would figure that was about it.

17 MR. PAPAGNI: That's all my questions.

18 THE COURT: Thank you. You may step down.

19 Your next witness, please.

20 THE WITNESS: Am I out the door?

21 THE COURT: Yes, sir.

22 THE WITNESS: Thank you.

23 MR. BLACKMAN: Your Honor, since we didn't take a
24 break --

25 THE COURT: We can take a break now.

Freeman - D - By Mr. Blackman

1793

1 MR. BLACKMAN: I think it would be appropriate.

2 Thank you.

3 THE COURT: All right. We'll take a break.

4 (Jurors exit.)

5 (Recess taken.)

6 (Jurors enter.)

7 THE COURT: All right. Your next witness, please.

8 MR. BLACKMAN: David Freeman.

9 THE COURT: Thank you.

10 THE CLERK: Raise your right hand.

11 (Witness sworn.)

12 THE WITNESS: I do.

13 THE CLERK: Thank you. Please have a seat.

14 Please speak clearly into the microphone here. And
15 there's water, if you would like some.

16 Please state your full name, and then spell your
17 name for the record.

18 THE WITNESS: David Freeman. That's D A V I D,
19 F R E E M A N.

20 DIRECT EXAMINATION

21 BY MR. BLACKMAN:

22 Q. Mr. Freeman, how are you currently employed?

23 A. Sir, I'm an Oregon licensed private investigator.

24 Q. How long have you been an investigator -- private
25 investigator?

Freeman - D - By Mr. Blackman

1794

1 A. Private investigator for a little over 20 years.

2 Q. Before you went into the private investigation business,
3 what did you do for a living?

4 A. I started many years ago as a military policeman, for three
5 years. Then I served as an Idaho state trooper for four years.

6 Then I went to college. I was a loss prevention
7 manager for all Sears Roebuck in Idaho.

8 After I graduated from college, I was hired by the
9 Federal Bureau of Investigation as an agent, and sent to Los
10 Angeles, California.

11 Q. And how long were you an F.B.I. agent?

12 A. Eight years. I was medically retired.

13 Q. Were you -- came to assist in the investigation of -- by
14 the defense in this case?

15 A. Yes, sir, I was.

16 Q. And in connection with that assignment, did you attempt to
17 contact various people who might be witnesses in the case?

18 A. I did.

19 Q. Was one of those people that you contacted Stacey Davies?

20 A. Yes, sir.

21 Q. Who was he?

22 A. Stacey Davies is the manager or director of Roaring Springs
23 Ranch, here in Oregon.

24 Q. How did you -- were you able to contact Mr. Davies?

25 A. Yes, sir, I did.

Freeman - D - By Mr. Blackman

1795

1 Q. How did you do that?

2 A. I contacted him by telephone, and asked if he would be
3 available and if I could interview him.

4 Q. Was he agreeable?

5 A. He was. He said that he would like for me to send him
6 copies of reports that were made by B.L.M. investigators when
7 they had visited him, so that he might review them. And then
8 he would have an interview with me regarding those reports
9 only, by telephone.

10 Q. So did you in fact make arrangements to provide a copy of
11 that B.L.M. investigative memorandum of his interview by them
12 to him?

13 A. Yes, sir, I did.

14 Q. And how did you do that?

15 A. I sent it to him by e-mail.

16 Q. About when was that?

17 A. I would have to refer to my notes, or my report.

18 Q. Do you have that with you?

19 A. I do.

20 Q. Why don't you go ahead.

21 A. (Pause, referring.) I contacted him on -- for the
22 interview on April 25th, 2011.

23 Q. Okay. And when did you actually talk to him, to go over
24 the report that had been written by the B.L.M?

25 A. That would be the April 25th, 2011.

Freeman - D - By Mr. Blackman

1796

1 My previous contact with him was on April 15th,
2 2011.

3 Q. So when you talked to him, after he had a copy of the
4 report, how did that interview get conducted?

5 A. We spoke on the phone. And as per his request, I asked him
6 if he could go through the B.L.M. investigator's report, and
7 make comments on that report.

8 Q. Did he then read the report and talk to you about it?

9 A. He apparently had already read the reports, and he went
10 through the reports with me as we spoke, yes.

11 Q. Okay. Now, in the report, was there a section in which he
12 was quoted by the B.L.M. investigator as saying that on -- on
13 an occasion, Steve Hammond stated to him, Why go through all of
14 this burn prescription stuff in what two matches can do in
15 August? Did he make any comment to you about that part of that
16 report?

17 A. Yes, sir, he did. His comment to me was that -- if I could
18 get my spectacles out, so I can read. (Pause, referring.)

19 I asked him -- he reviewed the report, and then said
20 that in paragraph 1, page 1 -- and that's where it reflects
21 that statement that you just mentioned -- there's mention of
22 Steve saying a couple of matches in August would be a simple
23 way to handle things.

24 Stacey said that Steve has said a couple of times
25 that if B.L.M. would use a couple of matches in August, it

Freeman - D - By Mr. Blackman

1797

1 would be a lot simpler than all of the complicated plans that
2 they do.

3 Q. Okay. Now, was there also, as part of your assignment, an
4 effort to determine what kind of foot track would be left by
5 Dwight Hammond?

6 A. Yes, sir.

7 Q. Okay. And tell us what you did to try to make that
8 determination.

9 A. Well, the easiest and -- and most logical thing to do is to
10 measure their feet, to find out what size feet and what size
11 boots they wear.

12 So I did that. I went to Mr. Hammond's home. And I
13 had him get a pair of boots.

14 I measured his feet in his stocking feet, and I
15 traced those out very carefully on paper, which I initialed
16 and dated.

17 And then I had him put boots on and I -- using other
18 pieces -- separate pieces of paper, traced out the boot size
19 and the outline of the boots.

20 I photographed both him with his feet in the
21 outlines of -- of my drawings, and his boots on him and the
22 outlines of my drawings.

23 Q. And I would like you to look, now, at Exhibit 1186.

24 And the -- do you recognize what that is?

25 A. That's Dwight Hammond's left foot in his stocking, or sock.

Freeman - D - By Mr. Blackman

1798

1 It has -- bears my initials, 1-23-11.

2 Q. And what was his foot length?

3 A. You're going to ask me to read that? (Laughing.)

4 Q. I can give you a hard copy, if you would like.

5 THE CLERK: I have one here.

6 THE WITNESS: Here we go, 11 3/16 inches in length.

7 And it was -- there we go.

8 The bigger you get it, the worse it looks.

9 A little over four inches in width.

10 BY MR. BLACKMAN:

11 Q. And then if you would look at the next page of that
12 exhibit.

13 What is this?

14 A. This is a right foot. If you pull it -- there we go.
15 Dwight Hammond's right foot, also in a stocking.

16 Again, my initials and the date appear thereon.

17 And I put measurements, from toe to heel, on it; as
18 I did with the others.

19 Q. And the length of that foot?

20 A. Ten and -- I believe it was 10 15/16. That's correct.

21 Q. And then the next page of that exhibit.

22 A. That would be Dwight Hammond's left footprint. This is
23 with his feet in the boot. And I traced this out on
24 legal-length paper.

25 Q. And the length of that boot?

Freeman - D - By Mr. Blackman

1799

1 A. Length of that boot is 11 3/4 inches.

2 Q. And the next page.

3 A. That would be Dwight Hammond's right footprint.

4 Again, he was wearing the boot, standing on an 11
5 by -- or 8-1/2-by-14 piece of paper.

6 It does contain my initials and the date. And it is
7 Dwight Hammond's right footprint.

8 Q. And the length of that footprint?

9 A. I would say 11 7/8 inches.

10 Q. Okay. Now, I would like you to look at Exhibit 1187.

11 And tell us if this is the actual pictures showing
12 how you made those tracings and measurements.

13 A. That's correct. After I made the tracings, I took
14 photographs of Mr. Hammond standing with his feet on the tracks
15 that I had made, the outlines that I had made, with a ruler.

16 That's a 12 1/2-inch ruler, by the way.

17 Q. And so that is showing the actual length of his boot being
18 what you had measured it, at 11 3/4 inch?

19 A. Yes, sir.

20 Q. And did you do -- let's go to the other two pages of that
21 exhibit list.

22 That's, again, another photograph that shows how you
23 took that measurement?

24 A. Yes, sir.

25 Q. And the next page, as well.

Freeman - D - By Mr. Blackman

1800

1 Okay. Then, in addition to that, did you see what
2 kind of print he would leave in soil?

3 A. I did.

4 Q. And how did you do that?

5 A. Took Mr. Hammond outside, to an area that was dirt, while
6 he was wearing his boots. And I had him walk in soil. And I
7 put a measurement to the -- and took a photograph and measured
8 the footprint that was left behind.

9 Q. Showing you what's been marked as 1188.

10 Can you tell us if that is the footprint and the
11 measurement?

12 A. Yes. That is the footprint that I took. That is the
13 measurement.

14 And I used the pen for one end and the cap for the
15 other, just to show the outside edges of both the toe and the
16 heel.

17 Q. And what was the footprint that you measured?

18 A. As I recall, it was 11 7/8. Just a hair -- right at 12, I
19 guess you would say. Right at 12 inches.

20 Q. Now, in addition to that -- in addition to that, were you
21 asked to look at Government Exhibit 197?

22 Which is going to be brought up on the screen, here,
23 in a moment.

24 Do you recognize that as Government Exhibit 197?

25 A. Yes, I recognize the photograph.

Freeman - D - By Mr. Blackman

1801

1 Q. And what do you understand that to be a photograph of?

2 A. I understand that to be a photograph of a footprint that
3 was alleged to be Dwight Hammond's.

4 Q. Okay. And were you asked to do anything, based on the
5 things that are portrayed in that photographs?

6 A. Yes, I was.

7 I was asked to determine the manufacturer,
8 dimensions, and period of manufacture of the pen that's shown
9 in the photograph.

10 Q. Okay. So I would ask Mr. Schroeder if he can blow up that
11 portion of the photograph.

12 And were you able, over time, Mr. Freeman, to
13 identify the make and model of the pen?

14 A. Yes, I was.

15 Q. And how did you do that?

16 A. Well, we went to various supply places. We went to
17 catalogs. We looked at pens. And I had people searching to
18 find pens that looked like this, with this particular
19 photograph.

20 Q. And were you ultimately able to identify the kind of pen it
21 was?

22 A. Yes. And my mind just went completely blank.

23 Q. Well --

24 A. (Laughing.)

25 Q. We could blow it up a little more.

Freeman - D - By Mr. Blackman

1802

1 A. It's a P-145, is the model of the pen. I know it's 5 5/8
2 inches in length. And it's a Pilot. It's also called the
3 Pilot Better pen.

4 I was able to determine from Pilot International, in
5 Florida, that this pen was manufactured before, during, and
6 after the year 2006.

7 Q. And were you actually able to find and acquire a box of
8 these pens that are the same pen that's in this picture?

9 A. Yes, sir, I did.

10 Q. I would ask to have the clerk show you what's been marked
11 for identification as -- as Defendant's Exhibit 1217.

12 A. (Handed box.)

13 Q. And is that a box containing pens that match the one that's
14 in that photograph?

15 A. Yes, sir, it is.

16 Q. And I think you've already said it, but just to be clear,
17 did you then, at some point, measure the length of that
18 particular pen?

19 A. Yes. It's -- we did a measurement. It's 5 5/8 inches,
20 with the point retracted.

21 Q. All right. So in the -- in the form in which it is
22 portrayed, in this exhibit, Government Exhibit 197, the pen is
23 5 5/8 inches?

24 A. That's correct.

25 MR. BLACKMAN: I would offer 1217.

Freeman - X - By Mr. Papagni

1803

1 MR. PAPAGNI: No objection.

2 THE COURT: Received.

3 MR. BLACKMAN: That's all I have.

4 Thank you, your Honor.

5 MR. MATASAR: No questions, your Honor. I'm sorry.

6 THE COURT: Mr. Papagni.

7 MR. PAPAGNI: Thank you.

8 CROSS-EXAMINATION

9 BY MR. PAPAGNI:

10 Q. The boots that we just got through talking about, when you
11 had him put them on, did you smell -- smell them to see if they
12 smelled like smoke?

13 A. No, sir. I did not.

14 Q. And this one photograph that had the ink pen in it, do you
15 know what happened to it? The print itself, what occurred?

16 A. Say that again, sir.

17 Q. This one photograph that he showed you, that was a print
18 where it had the ink pen in it, that you spent so much time
19 tracking down, do you know what happened to that print that was
20 on the side of the road, sir?

21 A. I do not.

22 Q. So you didn't read the report about how it got destroyed?

23 A. I don't know if this particular print was destroyed or not.

24 Q. You didn't read the reports that were done regarding the
25 rocks being put around a footprint, by Mr. Lance Okeson, which

Freeman - X - By Mr. Papagni

1804

1 was the basis of the photograph in which the pen was in? You
2 didn't read those?

3 A. I read such a report, but I don't know -- when I saw this
4 particular print, I don't know if that's the same print that
5 was mentioned in that report.

6 Q. I'm sorry.

7 Wouldn't it have made a difference if you read the
8 report that Mr. Okeson described how this individual was
9 walking at the time the print was made?

10 A. My task was to determine, if possible, the -- the make,
11 model, and dimensions of the pen.

12 Q. That was the extent of your task.

13 When you were doing these outlines of the footprint,
14 you had him standing there. Right?

15 A. Yes, sir.

16 Q. And the boots that he was wearing, he didn't tell you --
17 wear the boots that he was wearing back in 2006, did he?

18 A. No, sir.

19 Q. And the boots that he was wearing, when you did this --
20 when did you do this -- these photos here? How long ago was
21 that?

22 A. That was January 23rd, I believe, of 2011. It would show
23 on -- is reflected on the --

24 Q. Okay.

25 A. On the thing. My initials and date are on --

Freeman - X - By Mr. Papagni

1805

1 Q. So it would have been after Mr. Hammond was charged with
2 the offenses he's facing today?

3 A. Yes, sir.

4 Q. Okay. And you didn't read the report to see how the man
5 was walking, according to Mr. Okeson, as he crossed the Bridge
6 Creek area, did you?

7 A. I recall a report of Mr. Hammond walking across Bridge
8 Creek Road.

9 Q. Was he walking or was he running? Was he walking fast?
10 Was he falling down? Do you know at all?

11 A. I don't have a direct recollection. I've read many
12 thousands of pages on this.

13 Q. Yeah, there's a lot.

14 And so the best you can say is while he was
15 standing, his foot size -- or the boot he gave you was about
16 11 3/4 inch. And in the sandy print that you did -- was that
17 print that you did in the dirt, was that at the ranch itself?

18 A. Yes, sir.

19 Q. So that was about 12 inches, approximately?

20 A. Approximately 12 inches.

21 Q. Okay. Now, let's see.

22 You mentioned your -- you've been a private
23 investigator for quite some time, and you had this little
24 interview with Stacey Davies you were telling us about.
25 Right?

Freeman - X - By Mr. Papagni

1806

1 A. Yes, sir.

2 Q. And you did a report. Correct?

3 A. Yes, sir.

4 Q. And you did this interview -- when did you talk to
5 Mr. Davies about the statement that you say Mr. Davies made to
6 you?

7 A. You mean, when did I interview him?

8 Q. When did you do your report of the interview that contains
9 the statement --

10 A. I can't give you an exact date.

11 I can say that with this particular report. I
12 dictated it, and it was typed by someone else --

13 Q. Oh --

14 A. -- and I reviewed it. Excuse me, sir.

15 Q. I'm sorry. I interrupted you. It's my fault.

16 Go ahead, sir.

17 A. (Shakes head.)

18 Q. And then after you spoke to Mr. Davies, you dictated this
19 report, and you had someone type it for you.

20 A. (Nods head.)

21 Q. You sent it to Mr. Davies to review so he could sign and
22 correct it. Right?

23 A. No, I did not.

24 Q. Pardon me?

25 A. I did not. It is not my habit to send reports that I've

Freeman - ReD - By Mr. Blackman

1807

1 typed to anyone.

2 Q. Including the person you interviewed?

3 A. That's correct.

4 Q. You don't send it to them and say, Sir, I've interviewed
5 you. This is the statements I'm attributing to you. Would you
6 review it and make any corrections, and then sign it and send
7 it back to me.

8 You didn't do that, did you?

9 A. No, sir, I did not.

10 Q. Did you record the conversations, sir?

11 A. No, sir.

12 Q. Do you have a transcript of anything that would indicate
13 that besides you writing this report, that's what Mr. Davies
14 said?

15 A. That's my only recollection.

16 Q. And you were in the courtroom when Mr. Davies testified?

17 A. No, sir, I was not.

18 MR. PAPAGNI: No further questions.

19 REDIRECT EXAMINATION

20 BY MR. BLACKMAN:

21 Q. Mr. Freeman, did you have a copy of the memo of interview
22 that you sent to Mr. Davies?

23 A. Yes.

24 Q. Do you have it with you today, as part of your report?

25 A. Yes, sir.

Freeman - ReX - By Mr. Papagni

1808

1 Q. Is that a statement that Mr. Davies signed?

2 A. No, sir.

3 Q. Isn't it merely a memorandum of interview written by Dennis
4 Shrader, a resident agent of the B.L.M?

5 A. That's correct.

6 Q. So did you ever see any report of a statement by Mr. Davies
7 that he had signed?

8 A. No, sir.

9 Q. All right. Did the Government have him sign the statement
10 that -- where they're attributing words to him?

11 A. I don't have any knowledge of that.

12 Q. All they had was a memorandum written by their agent after
13 he talked to Mr. Davies?

14 A. That's all I've seen, sir.

15 MR. BLACKMAN: Thank you.

16 THE COURT: Anything further?

17 MR. PAPAGNI: Just one moment, your Honor.

18 (Pause, referring.)

19 RECROSS-EXAMINATION

20 BY MR. PAPAGNI:

21 Q. You weren't in the courtroom when Mr. Davies was asked if
22 he had seen a copy of his report, which included his statement,
23 and he testified he had.

24 A. Say that again, sir.

25 Q. Sir, were you -- you were not in the courtroom when he was

Freeman - ReX - By Mr. Papagni

1809

1 asked -- Mr. Davies was asked, while he was on the stand, that
2 you've seen --

3 MR. MATASAR: Objection, your Honor. I think the
4 question should be if he was in the courtroom when Mr. Davies
5 testified. Nothing more should be part of the question.

6 THE COURT: I agree.

7 MR. PAPAGNI: I'll rephrase the question.

8 BY MR. PAPAGNI:

9 Q. Do you have -- did you ever ask Mr. Davies if he was shown
10 a copy of Mr. Shrader's report before he testified in this
11 case?

12 A. I don't understand your question, sir.

13 Q. Before Mr. Davies took the stand, was he given a copy of
14 Mr. Shrader's report to review? Do you know if he was or the
15 wasn't?

16 A. I have no idea, sir. I was in Idaho at the time.

17 MR. PAPAGNI: Those are all of my questions.

18 Those are all of my questions. Thank you.

19 THE COURT: You may step down. Thank you.

20 Your next witness, please.

21 MR. SCHROEDER: Al Steninger, your Honor.

22 THE CLERK: Please raise your right hand.

23 (Witness sworn.)

24 THE WITNESS: I do.

25 THE CLERK: Thank you. Please have a seat.

Steninger - D - By Mr. Schroeder

1810

1 MR. SCHROEDER: Madame clerk, could I give you this
2 Exhibit 1210 -- which is the large one -- to put up behind
3 Mr. Steninger, on the easel, please.

4 THE CLERK: Please speak clearly into the microphone.
5 And here's water, if you would like some.

6 If you would please state your full name, and then
7 spell your name for the record.

8 THE WITNESS: Al Steninger. S -- A L,
9 S T E N I N G E R.

10 DIRECT EXAMINATION

11 BY MR. SCHROEDER:

12 Q. Good afternoon, Mr. Steninger. Can you hear me okay?

13 A. I can.

14 Q. Are you going to be testifying about some range and grazing
15 permits this afternoon, for a little bit?

16 A. I will.

17 Q. First of all, can you tell the jury your educational
18 background.

19 A. I have a -- bachelor's degree in animal husbandry. A
20 master's degree in range management. Both from Colorado State
21 University.

22 Q. And when did you graduate from Colorado State?

23 A. When?

24 Q. Yes.

25 A. I received a bachelor's degree in 1958 and a master's

Steninger - D - By Mr. Schroeder

1811

1 degree in 1962.

2 Q. Can you try to get that mic closer to you, Mr. Steninger,
3 please. You can try to move it a little bit, too.

4 A. It's moved as far as it's going to go.

5 Q. That would be fine.

6 Prior to going to college and graduating from
7 Colorado State to -- were you ever a buckaroo or a cowboy?

8 A. Yes, I was.

9 Q. And can you explain that to the jury, please.

10 A. Oh, I buckarooed for a number of the large outfits in
11 Northern Nevada. And was the assistant cow boss -- they call
12 them a jigger boss -- for the Ellison Ranching Company Midas
13 operation in Elko County, Nevada.

14 I worked for a number of the large outfits over a
15 period of four or five years as a buckaroo.

16 Q. And can you explain a little bit more about being a
17 buckaroo at any point in time, or do you spend any time on a
18 horse?

19 A. A buckaroo in Nevada -- particularly for those large
20 outfits -- is you are exclusively working with booming the
21 cattle, the processing of the cattle. It's -- it is no ranch
22 work. It's strictly working with cattle, and booming the
23 cattle and the processing of the cattle.

24 Q. And at that point in time, would you use horses to move
25 cattle?

Steninger - D - By Mr. Schroeder

1812

1 A. Yes.

2 Q. At any point in time would you get on your feet to move
3 cattle?

4 A. Yes. But the buckaroo doesn't get on his feet very much.

5 Q. Okay. Can you explain those circumstances where a buckaroo
6 would get on his feet to move cattle.

7 A. Well, you would -- you would -- if it were an area that was
8 difficult to go through with a horse, extreme rockiness,
9 extreme brush, that sort of thing, where it would be safer and
10 more expedient to move afoot than you would horseback, then
11 that's what you do.

12 Q. And since those earlier years, have you continued to
13 periodically ride horses?

14 A. Yes, I have.

15 Q. And use horses to help move cattle?

16 A. Yes.

17 Q. Now, after graduating from Colorado State, what did you do?

18 A. I went to work for the Bureau of Land Management, in the
19 Lakeview district, which lays immediately south of the Burns
20 district. I was a range conservationist for two years, 1962
21 and 1963.

22 And I was among the first slate of area managers in
23 the United States. I was the area manager of the High Desert
24 resource area, which was the western half of the Lakeview
25 district.

Steninger - D - By Mr. Schroeder

1813

1 Q. And how long did you stay working for the B.L.M?

2 A. I worked for four more years, from 1962 to 1968. I was
3 area manager.

4 Q. And after you -- did you end your employment with the
5 B.L.M.?

6 A. Yes, I did.

7 Q. Did you end in good standing?

8 A. Yes.

9 Q. And what was the reason why you changed employment from the
10 B.L.M.?

11 A. I went into the range and ranch management consulting
12 business.

13 And, incidentally, I not only left in good standing,
14 but I was approached by the associate director of the Bureau
15 of Land Management to be in charge of the range management
16 program for the entire Bureau of Land Management.

17 Q. And you declined that job?

18 A. I did.

19 Q. And you decided to do something else?

20 A. I decided -- I had been in business a couple of years, and
21 I decided to continue as a range and ranch management
22 consultant. My name of my firm was Western Range Service.

23 Q. And how did you get into working for and with Western Range
24 Service?

25 A. I organized Western Range Service. During the time of my

Steninger - D - By Mr. Schroeder

1814

1 college years, I found a mentor who was -- probably the first
2 range management consultant in the United States, among them.
3 And he advised me on the education and the practical experience
4 that I needed to -- to get into the range management
5 profession.

6 Q. And have you stayed with Western Range Service ever since
7 then?

8 A. Yes.

9 Q. And so how many years has that been?

10 A. 1st of July, it will be 44 years.

11 Q. And as a range consultant, do you also -- are you also a
12 licensed appraiser?

13 A. Yes, I'm a general certified appraiser in the state of
14 Nevada.

15 Q. Now, in those 40-plus years that you've been a range
16 consultant and an appraiser, have you been employed by any
17 federal court to provide any expertise or any service to the
18 federal court?

19 A. I was employed by the U.S. Federal District Court in Nevada
20 to do an economic analysis of the Big Springs Ranch, which is
21 in Eastern Elko County, in conjunction with a bankruptcy filing
22 that the judge was handling.

23 Q. And in the course of these 40 years, have you been employed
24 or engaged by the Bureau of Land Management to provide any
25 service?

Steninger - D - By Mr. Schroeder

1815

1 A. I was authorized by a B.L.M. solicitor out of Idaho to
2 testify for the B.L.M. in regard to a grazing decision in the
3 Lakeview district involving the Viewpoint Ranch, which is a --
4 a -- probably 50 -- 50 miles south of Steens Mountains.

5 Q. Have you, in your 40 years as a consultant appraiser,
6 worked for private individuals or entities dealing with range
7 management and grazing-related management issues?

8 A. Continuously.

9 Q. And can you explain generally the scope of your work and
10 duties that you will typically do and have done the last
11 40-plus years.

12 A. We operate as kind of a liaison between the -- primarily
13 between the owners of livestock ranches with grazing permits
14 and working out grazing plans and doing extensive rangeland
15 monitoring, in which we do studies of grazing utilization, the
16 use of the -- of the forage by -- by cattle, long-term trend
17 measurements. We've done -- and we have some clients that work
18 for -- doing those types of monitors for single clients for as
19 much as 30 years.

20 Q. Can you explain to the jury the different sizes of
21 operations that you work for now and have worked for in the
22 past?

23 A. They range from operations of approximately 500 cattle up
24 to over 9,000 cattle.

25 And in addition to the grazing, I've also managed

Steninger - D - By Mr. Schroeder

1816

1 ranches, as well.

2 Q. And can you explain what that entails?

3 A. Well, it involved both liquidation management, where
4 ranches were being -- large ranches were being liquidated. And
5 that particular liquidation management was a ranch of 65,000
6 acres and about 6,500-cattle operation. Liquidated that for
7 Chase Manhattan Bank.

8 I have been the overall supervisor for a large ranch
9 in Nevada for seven years, that had 244,000 deeded acres and
10 three quarters of a million acres public land administered by
11 the B.L.M.

12 I've managed ranches in Central Nevada. Done the
13 grazing and ranch management activity for many years. The
14 grazing part for 30 years. Ranch management part probably
15 for the last ten years. A ranch in -- several in Nevada.
16 One's about a half-a-million acres of federal lands
17 administered by -- part of it by the Forest Service. The
18 remainder by the Bureau of Land Management. Acres of private
19 land of about 5,000 -- 5,000 acres.

20 Q. What percentage of your work over the last 40 years have
21 been related to ranching operations that are dependent on
22 public land use or national forest systems land use?

23 A. At least 90 percent.

24 Q. And what does that mean when there's a dependency by use?
25 When I use those words, what does that mean to you, as a

Steninger - D - By Mr. Schroeder

1817

1 consultant in range?

2 A. With respect to the Bureau of Land Management, grazing
3 preferences on these ranches are based upon the dependency by
4 use, the grazing use, prior to 1934, or -- or the dependency by
5 location.

6 Those ranches made applications after the passage of
7 the Taylor Grazing Act of 1934. And their base properties,
8 the private lands they -- they owned or leased or controlled,
9 received grazing preferences, which is -- a grazing
10 preference would be the -- the quantity of forage expressed
11 in animal unit months. Meaning basically one mature cow, or
12 cow and calf, or their equivalent for one month; the amount
13 of forage they would consume in a month.

14 That's the way the Bureau of Land Management
15 quantifies the forage and the grazing preference.

16 And that -- primary -- what I've worked with is
17 Section 3 of the Taylor Grazing Act, which the Hammond ranch
18 falls under.

19 Q. Do you have any certifications -- do you have any
20 certifications with, like, any particular societies,
21 Mr. Steninger?

22 A. Well, I have had, over the -- over the years, I think --
23 I -- may I look at my curriculum vitae, to tell you the names
24 of them?

25 Q. Absolutely.

Steninger - D - By Mr. Schroeder

1818

1 A. That would be -- (pause, referring to notebook.) If you
2 could tell me my curriculum vitae number.

3 Q. Yes, that's 1208.

4 A. (Pause, referring.) Well, I've -- I've been, either past
5 or present, a certified member of the American Society of
6 Agriculture Consultants. A professional member of the American
7 Society of Farm Manager and World Appraisers. Charter member
8 of the Association of Rangeland Consultants. Federal Lands
9 Legal Foundation, I'm a member of. National Association of
10 re -- Review Appraisers and Mortgage Underwriters. Senior
11 designated member. Certified review appraiser. National
12 Cattleman's Association member. Nevada Cattleman's Association
13 member. The Society of Range Management, life member.

14 Q. And does the Society For Range Management have any
15 particular certifications for professional range consultants?

16 A. They do.

17 Q. And do you hold that certification?

18 A. I do not.

19 Q. And what is the -- the Society for Range Management?

20 A. It's an international society, and it is made up -- the
21 principle membership are public employees, primarily. And
22 those that are in the independent consulting businesses, as I
23 am; which there aren't many. And they have annual meetings.
24 They have continuing education. And state society -- state
25 organizational meetings. And they have -- they have annual

Steninger - D - By Mr. Schroeder

1819

1 meetings as well.

2 Q. And you're a life member of the SRM?

3 A. Yes.

4 Q. Have you been the author or co-author of any publications?

5 A. Yes.

6 Q. And what are those?

7 A. Well, there's quite a few here. Do you want me to go
8 through all of them?

9 Q. Well, why don't you first tell us how many you've been an
10 author or co-author of in the last 40 years, Mr. Steninger.

11 A. Ten.

12 Q. And what have been the general topics of those?

13 A. Mainly to do with livestock grazing and appraisal issues.
14 And also research I did at the university -- or Colorado State
15 University on the effects of sagebrush treatment on beef
16 production, which might -- was my master's thesis. And
17 research I did in Western Colorado on the sagebrush rangeland.

18 Q. During the last 40 years and as a matter of your ongoing
19 practice, do you stay current with the B.L.M. grazing rules,
20 the B.L.M. grazing manuals, the B.L.M. grazing handbooks, the
21 B.L.M. technical references relating to monitoring and
22 evaluation of rangelands, as well as the authorization of
23 grazing use on public lands?

24 A. Yes.

25 Q. Can you tell us what a grazing permit is?

Steninger - D - By Mr. Schroeder

1820

1 A. Well, a grazing permit would then be the document that
2 specifies what the grazing preference I earlier described was
3 on that base property.

4 And then it sets forth the numbers of livestock.
5 Typically sheep or cattle. The season of use, the time of
6 year they would graze, and the qualification of the location,
7 and the amount of forage expressed in AUMs as authorized for
8 that permit holder to use on public land.

9 Q. And how does -- excuse me.

10 How does a permittee get a grazing permit?

11 A. Well, all of the -- all of the permits date back to the
12 grazing preferences that were issued following the 1934 Taylor
13 Grazing Act, in which the -- in which the Taylor Grazing
14 Service, by dependency by use or dependency by location,
15 allocated and assigned this grazing through that base property.

16 So you would have to either purchase the base
17 property or have a transfer of the grazing that's on the base
18 property to other -- other base property you would have. And
19 that base property would have to be enough to support the
20 livestock that are authorized to graze on the public lands
21 when -- during the offseason. And, in Oregon, it's five
22 months of base property requirements.

23 Q. What is an annual grazing billing associated with the
24 grazing permit?

25 A. An annual grazing billing would be one thing -- you get the

Steninger - D - By Mr. Schroeder

1821

1 bill, and -- which charged the permittee for the use of grazing
2 for that year.

3 Typically, in the wintertime, prior to the -- the
4 grazing year -- the grazing year, incidentally, begins on
5 February 1, and it ends -- around March 1, and it ends on --
6 in February, is when the grazing year occurs.

7 So during the winter, typically the permittee would
8 sit down with the Bureau of Land Management and work out --
9 say, maybe it changes, or modifications of the grazing system
10 that -- the grazing plan that existed on the ranch with
11 respect to the numbers of livestock, the fields they would be
12 grazing, and -- the pastures or fields that they would be
13 grazing in during the course of the year, for the -- for the
14 grazing year.

15 Q. What is an actual use report?

16 A. An actual use report then would be the report that the
17 permittee submits to the Bureau of Land Management.

18 After the following -- after the following of the
19 annual year grazing unit, in which they would report the
20 actual numbers of livestock, the -- the fields or pastures
21 they were in, the allotments they were in, how long they were
22 in. And the purpose of that would be for the Bureau of Land
23 Management to calculate the amount of grazing that took
24 place, the amount of AUMs that were taken from the land.

25 For their monitoring purposes, they would then look

Steninger - D - By Mr. Schroeder

1822

1 at their range monitoring studies; the utilization, which
2 would be the amount of grazing that had taken place; trend
3 work; change in the condition of the range, in evaluating
4 changes in the grazing management that they may want to
5 institute on that particular operation.

6 Q. What's a compliance inspection form?

7 A. A compliance inspection report would be one that would be
8 made out of -- by a Bureau of Land Management employee when --
9 in which he would allow the allotment, and was observing if
10 your cattle were in the place they had been scheduled to be.
11 Primarily, that would -- how they were complying with the
12 grazing billing for that year.

13 Q. Let's talk about Hammond Ranches, Incorporated.

14 Did you have an opportunity to make a field
15 inspection of the Hammond -- the Hammond FFR, the Mud Creek,
16 and the Hardie summer allotments?

17 MR. PAPAGNI: Excuse me, Judge. Before he starts go
18 into that --

19 THE WITNESS: I did.

20 MR. PAPAGNI: Before he starts going into that area, I
21 think there needs to be a qualification by your Honor under the
22 **Daubert** decision.

23 THE COURT: I'm going to allow him to testify.

24 MR. PAPAGNI: Thank you.

25 THE WITNESS: I'm sorry. I didn't hear what he said.

Steninger - D - By Mr. Schroeder

1823

1 I'm hard-of-hearing.

2 BY MR. SCHROEDER:

3 Q. That's okay, Mr. Steninger.

4 Did you make a field inspection of the Hammond --
5 the Hammond FFR, the Mud Creek, and the Hardie summer
6 allotments?

7 A. I did.

8 Q. And when did you do that?

9 A. On May 30th and May 31st, 2012.

10 Q. And where did you go?

11 And maybe it would help you, if you look over to
12 your left shoulder, there's Exhibit 1210.

13 And let me open that, here, on the --

14 A. If I can figure out how to run this thing (indicating
15 pointer).

16 Q. And if you would point to the spring -- the screen -- and
17 this is Exhibit 1210. And if you want me to blow up any
18 area --

19 A. Just a moment. She's going to have to show me how to run
20 this strobe. (Pause, referring.)

21 What's the question, again?

22 Q. Can you -- can you generally tell -- tell the jury where
23 you went.

24 A. The first day (pointing), here's the headquarters, where
25 the alfalfa fields are.

Steninger - D - By Mr. Schroeder

1824

1 We traveled up -- oh, to the area of the -- Krumbo
2 Springs, No. 2, and the Krumbo Creek fields -- that's better.

3 First I will point out that the blue circles are
4 units of the federal range on their grazing permit. These --
5 there was four of them.

6 There's -- on the north end there's two. What they
7 call the dust -- the unit -- dust bowl No. 1 unit and the
8 Krumbo Springs No. 2 unit.

9 You can see the blue outline is -- is the fenced
10 federal range.

11 Well, the fenced federal range means -- is there's a
12 small amount of public land acreage within this fenced field
13 or fenced area.

14 So what the Bureau of Land Management does is simply
15 charge them for what they calculated to be the AUMs that are
16 within that field.

17 And in this case, in the grazing permit, they're
18 authorized to use these fenced federal range fields any time
19 of the year. They basically collect the -- collect a fee for
20 the amount of forage the Bureau determines that's in those
21 fenced federal range units, and the time of use is up to the
22 operator.

23 With -- and -- so that they -- the first day that we
24 left, we came out and looked around at Krumbo Creek. And
25 the -- and it's confusing.

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1 Krumbo Creek is a -- these three -- the three
2 fields -- the holding field, the Krumbo Creek field, and the
3 other field here are really all the Krumbo Creek pasture or
4 field, as you may want to call it, as shown on their grazing
5 billing within the Hammond allotment.

6 So this is the Krumbo Creek unit of the Hambo --
7 Ham -- of the Hammonds' -- Hammond allotment. And right
8 below it is the unit -- the fenced federal range unit called
9 Krumbo Springs No. 2.

10 And we went from the main headquarters out into the
11 north end of the Krumbo Springs unit, or the fenced federal
12 range unit. And into the Krumbo Creek pasture of the Hammond
13 allotment.

14 Q. And what did you do on the second day?

15 A. On the -- on the -- well, on the -- on the first day, we
16 also went to the south end of the allotment.

17 Q. Oh.

18 A. I need to move the map up a bit.

19 In the afternoon of the second day, we went and
20 inspected the Mud Creek allotment of the Hammond ranch, which
21 is made up of two fields, the lower field and the upper
22 field.

23 We entered it off the refuge. The lower end of the
24 field, we went in and inspected it. In pasture No. -- the
25 lower pasture. Went through this gate, and continued up to

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1 where the -- essentially where the road ended in the upper
2 field of the Mud Creek allotment. That was the afternoon of
3 May 30th.

4 Q. And so I might have said the second day.

5 So the first day you were up in the Krumbo Springs
6 area, and the latter part of the -- excuse me.

7 The first day you were up in the upper part, in the
8 Krumbo Springs area. And on the latter part of the first
9 day, you were down in the Mud Creek area?

10 A. That's correct.

11 Q. Okay. And what did you go -- and where did you go on the
12 second day?

13 A. Have to -- move -- move it to the north. Move your map
14 up -- other direction up.

15 Q. Okay. Well, first of all, can you trace the direction of
16 how you got to the south?

17 A. Well, we left from the headquarters, went down past the
18 Malheur refuge, and to Frenchglen. Frenchglen is a little
19 further south. And came in on the loop road, which would --
20 the loop road -- whoop.

21 Q. Let me get --

22 A. You're in Mud Creek, and you need to go to the right.
23 You're a little bit -- too much magnification.

24 Move it to the right, please, and -- and reduce the
25 magnification a bit.

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1 Q. No, reduce.

2 A. Okay. Just -- just move the map up, and we can -- I can
3 show you where the -- well, Frenchglen would be off to the
4 lower left corner of the map.

5 You don't need to move it anymore. We're just
6 moving it back to -- over.

7 This is the area we want to look at, in here
8 (pointing).

9 We came up the loop road -- the loop road. And it
10 brings you into the cabin allotment. And we went in the
11 cabin allotment through -- through the loop road, back down
12 to the corner of the fenced federal range Mud Creek No. 4
13 field. Back up through the north field, Thompson field, and
14 the Bridge Creek field on what they call the Bridge Creek
15 Road. And then went out of the -- circling up to the -- out
16 of the north end of the allotment and back into the
17 headquarters.

18 Q. And so that's what you did over those two-day period?

19 A. Yes.

20 Q. In your years of experience within this general area, have
21 you done any other work or similar inspections with similar
22 type of topography and vegetation that you saw here in these
23 four allotments that you looked at on those two days?

24 A. Yes, I have. It's juniper and sagebrush, grasslands that
25 are common in Northern Nevada -- Northern Nevada, Oregon, and

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1 Idaho.

2 And a number of years ago, I worked with the Roaring
3 Springs Ranch, which is a large ranch immediately -- almost
4 immediately south of this, that is also on the Steens
5 Mountains, in developing property with the B.L.M., a grazing
6 management program for the Roaring Springs Ranch.

7 Q. Before and after making your field inspections of these
8 four allotments, did you review information provided by the
9 Government to defense counsel relating to the B.L.M.'s grazing
10 files as to the Hammond Ranches?

11 A. Yes, I did.

12 Q. And in reviewing those documents, did you review the
13 Hammonds' permit that was effective between 1994 and 2004?

14 A. Yes, I did.

15 Q. And did you review Hammond Ranches' application to renew
16 their grazing permit in 2003?

17 A. Yes, I did.

18 Q. And did you review Hammonds' grazing permit effective
19 between 2004 and 2014?

20 A. Yes.

21 Q. Did you review Hammond Ranches' 2006 grazing billing?

22 A. I did.

23 Q. Did you review Hammond Ranches' 2006 actual use report?

24 A. Yes, I did.

25 Q. Did you review B.L.M.'s 2007 Mud Creek allotment,

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1 federal -- or fundamentals of rangeland health determination?

2 A. Yes, I did.

3 Q. Did you review B.L.M.'s 2007 Hardie summer allotment
4 evaluation?

5 A. Yes, I did.

6 Q. Did you review B.L.M.'s 2007 Hammond allotment -- allotment
7 evaluation?

8 A. Yes, I did.

9 Q. Did you review B.L.M.'s 2006 Hammond FFR allotment,
10 fundamentals of rangeland health determination?

11 A. Yes.

12 Q. As to Hammond Ranches -- and let me open up that first.
13 It's 1192.

14 A. (Pause, referring.)

15 Q. Is that the Hammond -- this is Exhibit 1192, Mr. Steninger.

16 A. Yes.

17 Q. Is that Hammond Ranches' grazing permit that was effective
18 between March 1st, 1994, and February 28th, 2004?

19 A. Yes, it is.

20 Q. And, to your knowledge, was it in good standing in 2001?

21 A. Yes, it was.

22 Q. Showing you Exhibit 1194.

23 Is that Hammond Ranches' grazing permit effective
24 March 2nd -- or March 1st, 2004, to February 28th, 2004?

25 A. Yes, it is.

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1 Q. Excuse me. February 28, 2014.

2 So what was the term of -- of the most recent
3 permit, Mr. Steninger?

4 A. Went from March 1, 2004, until February 28th, 2014.

5 Q. I want to show you Exhibit No. 1193.

6 And can you tell me what that is, Mr. Steninger?

7 A. That is their -- this is No. 1193?

8 Q. Yes, sir.

9 A. This is their 2003 application for a grazing permit
10 renewal.

11 Q. And can you tell the jury the significance of this
12 document, 1193?

13 A. Well, the permittee is applying to renew -- ten-year
14 permits are typically issued -- or term -- term grazing permits
15 are typically issued for a ten-year period.

16 So at the end of the term permit that was expiring
17 in 2004, they would make an application to renew that grazing
18 permit with the Bureau of Land Management.

19 Q. And is this Exhibit 1193 such a grazing application?

20 A. Yes.

21 Q. And this was signed by the Hammonds, to submit this
22 application? Looking at page 3 of 1193.

23 A. It was.

24 Q. And as a product of that application, was the 2004 grazing
25 permit, Exhibit 1194, issued?

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1 A. Yes, it was. The permit was issued then, for the period
2 March 1, 2004, through February 28th, 2014.

3 Q. And was this grazing permit, Exhibit 1194, was it in good
4 standing with the B.L.M. in 2005 and 2006?

5 A. Yes, it was.

6 Q. And can you explain that?

7 A. Well, if it -- if it was not in good standing, B.L.M. would
8 issue a grazing decision, taking action on the permit. And
9 there was no action taken. And so the permit was in good
10 standing.

11 Q. In your experience, what did you find relative to the
12 B.L.M.'s 2007 Mud Creek allotment fundamentals for rangeland
13 health determination as to the permit status of this allotment?
14 And that's Exhibit 1202.

15 A. (Pause, referring.) The determination standard for
16 rangeland health was conducted, and all of the five standards
17 were achieved.

18 Q. And can you tell -- and was it signed by the area manager
19 for the B.L.M.?

20 A. It was.

21 Q. A Karla Bird, on May --

22 A. May the 29th, 2007.

23 Q. And that's Exhibit 1202?

24 A. Correct.

25 Q. And can you tell the jury what the significance of these --

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1 the standards being achieved on the public land within the Mud
2 Creek allotment?

3 A. Well, they have five standards for rangeland health. That
4 they go out and make a determination whether the standards were
5 achieved or not achieved. And if they were not achieved, what
6 the problem might be.

7 And -- and in this report here, it even reports --
8 not only were the standards met, but the -- then things were
9 doing well in the Mud Creek allotment.

10 Q. And when B.L.M. makes a determination, can you explain --
11 like looking at Standard 1, watershed function, uplands, what
12 goes into the B.L.M.'s determination?

13 A. Whether -- they're looking at the -- the soils. Primarily
14 the soils and general condition of the upland watershed.
15 Upland being as opposed to riparian.

16 The riparian would be the meadows, lands that have
17 more water, so they stay greener throughout the year. So the
18 upland would be more the dryland vegetation.

19 And this would be a determination as to the
20 functioning of the uplands with regard to rangeland health.

21 Q. And can you explain that relative to Standard 2? How is
22 that different than Standard 1?

23 A. Well, it -- it then is in focus -- it's focused on these
24 riparian areas. You people would probably call it the meadow
25 types. More the meadow type. The vegetation that takes seed

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1 along water. And they're looking as to the conditions of the
2 vegetation there, the soils on -- on those lands.

3 Q. And what about Standard 3, ecological processes?

4 A. In ecological process, they would be looking at, basically,
5 the -- the conditions of the vegetation with respect to its
6 ability to support livestock grazing, wildlife; those type of
7 things.

8 Q. And looking on page 2 of Exhibit 1202, what about water
9 quality?

10 A. Basically looking at the water quality, particularly
11 standards for water purity, sediment, those type of things;
12 whether it was satisfactory or not.

13 Q. And what about Standard 5? What is that?

14 A. That would be the determination if there was any problem
15 with either threatened or endangered species, or species of
16 concern that are located within the allotment.

17 Q. Now, looking at Exhibit 1207, in your experience what did
18 you find relative to B.L.M.'s 2007 Hardie summer allotment --
19 allotment evaluation as to the permit status?

20 A. Say again your exhibit number.

21 Q. 1207.

22 A. I don't -- I don't believe 1207 is correct.

23 Q. Yeah, that's correct.

24 That's 1201. Excuse me.

25 A. 1208 is my curriculum vitae.

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1 Q. 1201.

2 A. 1201 would be a -- an allotment evaluation that was
3 conducted in 2007 in the Hardie summer allotment.

4 Q. And I won't go through each of the standards.

5 But similar to the Mud Creek allotment, did the
6 B.L.M. make a determination as to the fundamentals of
7 rangeland health standards on the Hardie summer allotment?

8 A. They did. It's paragraph 8 there, and all five standards
9 were achieved.

10 Q. I want to show you Exhibit 1198, Mr. Steninger.

11 And is that the 2006 actual use report of Hammond
12 Ranches?

13 A. (Pause, referring.) What's the number again?

14 Q. It's Exhibit No. 1198.

15 A. (Pause, referring.) Okay. Yes, that's a 2006 actual use
16 report that was submitted by the Hammond Ranches in January
17 2007.

18 Q. And can you explain again why it was signed in January
19 2007?

20 A. Well, Steve Hammond makes an entry. He says, Sorry this
21 report wasn't timely. I thought we would be meeting, and we
22 would talk then. The last entry on the front was the bowls.
23 Thought it was easiest to figure them separately.

24 Q. Mr. Steninger, I'm -- my question is focused in on -- this
25 is an actual use report.

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1 A. Yes.

2 Q. And -- and is it -- does a permittee submit it to the
3 B.L.M. after the end of the grazing season?

4 A. They do.

5 Q. Okay. And this is reflective of that?

6 A. Yes. And then this actual use report then -- the B.L.M. --
7 in -- in the right-hand columns, determine the numbers of
8 cattle by the different fields or allotments and the number of
9 AUMs that were consumed.

10 Q. And when you make reference to that, are you looking at
11 Exhibit 1198, on the right-hand side, where it says for B.L.M.
12 use only?

13 A. Correct.

14 Q. Okay. Did you find -- did you find anything in the B.L.M.
15 record, that you reviewed, that this actual use report, Exhibit
16 1198, was incorrect?

17 A. I did not. I found nothing.

18 Q. Now, in looking at the 2006 grazing billing, which is
19 Exhibit 1197, can you just explain to the jury generally -- I
20 don't want to get into specifics right now because I'll do that
21 a little bit later.

22 But, generally, looking at this grazing rotation
23 schedule on Exhibit 1197, which is the Hammond's 2006 grazing
24 billing, can you tell -- describe for the jury using Exhibit
25 1210, the general pattern of the rotation.

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1 So why don't you keep the billing in front of you,
2 and I'll put up the big map.

3 A. Well, it -- after they had -- they would meet -- they had
4 met with the Bureau of Land Management sometime prior to
5 February -- I mean, March 31st, 2006. And they then had worked
6 out the fields, the numbers of cattle, and the dates that would
7 be scheduled for use during 2006.

8 It would be a consideration of the actual use
9 reports that had been filed the prior year, and -- and the
10 desires of the permittee for the grazing for that year, and
11 the desire of the Bureau of Land Management to come to an
12 agreement as to how many cattle would be in which fields and
13 for how long.

14 Q. And using your pointer, and looking at Exhibit 1210 on the
15 screen, can you generally just describe the rotation of the
16 movement of the livestock that was planned per that grazing
17 billing?

18 A. Whoop. Pointing the wrong direction.

19 In April, the north -- well, during the winter
20 months, the two units of the -- of the fenced federal range
21 were used during the winter months.

22 And then into April, they began grazing in the
23 Krumbo Creek pasture, and -- and -- and some of the other
24 northern pastures.

25 As the season progressed, the cattle moved south.

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1 And, finally, then moving into the -- out of the -- into the
2 Hammond allotment during the spring, early summer, they were
3 scheduled. And then they were to enter the Mud Creek
4 allotment. First the lower field, upper field, and then
5 progressing into the -- into the Hardie summer field --
6 Hardie summer allotments later in the year.

7 Q. Thank you, Mr. Steninger.

8 And then looking at the grazing billing, Exhibit
9 1197, you commented about Krumbo Creek.

10 What was the grazing authorization within that
11 Krumbo Creek pasture?

12 Let me zoom in on that area.

13 And you've kind of already described it. But can
14 you outline the Krumbo Creek pasture, and tell the jury what
15 the grazing authorization was within that area?

16 A. The Krumbo -- the Krumbo Creek would -- of the Hammond
17 allotment would be -- going around -- it's (pointing) outlined
18 in brown against the blue here. That's the Krumbo Creek unit.
19 And that was grazed in April.

20 Q. And is that all public land within the Krumbo Creek pasture
21 of the Hammond allotment?

22 A. Yes.

23 Q. And would that be classified as spring range,
24 Mr. Steninger?

25 A. Yes. Yes, it would.

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1 Q. Now, the area that you said was winter range, is that part
2 below the Krumbo Creek pasture of the Hammond allotment,
3 looking at Exhibit 1210?

4 A. And that would be the Krumbo Springs unit of the fenced
5 federal range. And it would be the area that's encircled in
6 blue, right here.

7 Q. And that -- that area you've encircled in blue, is it
8 predominantly private land by --

9 A. Yes, it is.

10 Q. And the private land is represented by those hash marks?

11 A. Correct.

12 Q. On Exhibit 1210?

13 A. Correct.

14 The only -- only public land in there would be --
15 looks -- this little piece here, and then down at the bottom
16 of the allotment.

17 Q. And that's why it would be classified as FFR, as you've
18 explained?

19 A. Correct. Because it was primarily private land.

20 Q. And is the Krumbo Springs No. 2 of the Hammond FFR
21 allotment, is that classified as winter range?

22 A. It uses -- winter range on the grazing permit, they can use
23 it any time they want. But in there -- in their operation of
24 the ranch, they use it as winter range.

25 Q. In looking at the 2006 grazing billing and the 2006 actual

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1 use report relative to the Mud Creek allotment, was there a
2 difference in 2006, Mr. Steninger?

3 A. Yes, there was.

4 Q. And can you explain that to the jury, and why that
5 occurred?

6 A. When they make the grazing billing out in the grazing --
7 basically the grazing plan for the year, it's still wintertime.
8 And as -- as spring progresses, there are things that would
9 cause you to turn out later. They were authorized to be
10 turning out the 1st of April.

11 But that year they delayed turnout until the 17th of
12 April. Meaning there -- because of conditions of range
13 readiness, the growth of the plants, whether -- whether the
14 ground was wet, weather conditions, they -- they delayed the
15 turn -- turnout.

16 Consequently, when you delay the turnout, it will
17 slow down the movement of your cattle through the pastures,
18 as you go through the year.

19 Q. And so in comparing the 2006 grazing billing and the 2006
20 extra use report, did you see differences, also, in -- within
21 the Hardie summer allotment?

22 A. Yes. They -- and they -- so they were moving into the Mud
23 Creek allotment later because of this delayed turnout, and --
24 and were coming in -- about on schedule into the Hardie summer.

25 Q. Mr. Steninger, I'm now going to ask you some more specific

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1 questions on August 22nd, 2006, and August 23rd, 2006.

2 But before I do that, in looking at the exhibit
3 behind you, the -- the actual copy of Exhibit 1210, I want
4 you to look at the Bridge Creek pasture of the Hardie summer
5 allotment.

6 And can you tell the jury whether there is a mistake
7 on that -- on that exhibit as to two of the fences?

8 A. Yes, there is.

9 Q. And can you go up with this red pen and make the
10 corrections associated with that, as to your understanding of
11 the fenced pasture boundaries within the Hardie summer as of
12 August 21st, 2006.

13 A. This exhibit shows a -- a fence between the Bridge Creek
14 and Thompson. That was approved by a cooperative range -- a
15 cooperative agreement with the Bureau of Land Management for
16 that fence to be put in new and for the fence you'll see marked
17 as right below there, between the Thompson and the Bridge
18 Creek, that was an agreement that the permittee had as -- a
19 cooperative agreement with the Bureau of Land Management to
20 make those changes and put in new fencing and take out old
21 fencing. But by the 2006 grazing season, that had not yet
22 occurred.

23 So how do you want me to mark this?

24 Q. Well, why don't you just mark out, in red, the -- the fence
25 that should be removed.

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1 A. With hash marks?

2 Q. That would be fine. With a red marker pen.

3 And then put, using a red line, where it is. And
4 then just initial that, both of those spots, Mr. Steninger.

5 Thank you.

6 Now, looking up on -- Mr. Steninger, looking, now,
7 up on this screen -- because some in the jury may not have
8 seen the changes that you made. And can you show the jury,
9 looking on the screen, the two changes that you made using
10 the red marker -- or, excuse me, your red pointer.

11 It's been a white -- a whiting out. Basically done
12 the same thing. But just so we can see on the screen.

13 A. Oh, I see. I see. Yeah, this is the one (pointing) --
14 this is the fence shown on the other exhibit that was taken out
15 because it had not yet been constructed. And this fence still
16 existed.

17 Q. Okay. And so it's your understanding, in reviewing the
18 records and files, that what's on Exhibit 1210 -- as you have
19 now modified it -- would constitute the pasture boundaries of
20 the Mud Creek allotment and the pasture boundaries of the
21 Hardie summer allotment?

22 A. Correct.

23 Q. Based upon this information that you've reviewed, do you
24 have an opinion, given a lightning event on the evening of
25 August 21st, 2006, whether Hammond Ranches was prudent in

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1 removing their cattle in the lower pasture of the Mud Creek
2 allotment to the north pasture of the Hardie summer allotment
3 between August 21st, 2006, and August 23rd, 2006, as stated in
4 their 2006 actual use report? And just give me a yes or no.
5 Do you have an opinion, first?

6 A. Yes.

7 Q. And let's get into some -- some specifics as to the basis
8 for that opinion. Okay, Mr. Steninger?

9 A. All right.

10 Q. First of all, in looking at the actual use report -- and
11 let's -- let's get that up in front of the jury, which is 1198.

12 And can you tell the jury, looking at Exhibit 1198,
13 where you -- where you see the fact that the cattle were to
14 be -- or were removed from the Mud Creek area, up to the
15 north pasture; is my question asked.

16 A. The actual use report for the -- for the Mud Creek
17 allotment is identified on here as the Grandad, which is
18 another name for the Mud Creek allotment.

19 It showed that the 374 cattle went into the Mud
20 Creek allotment on July 20th. You see the seven twenty in
21 the second column -- or 7, slash, 20. That's July 20th.
22 They entered the allotment. 374 head.

23 And on the 22nd of August, 374 head left the
24 Grandad -- Grandad, which is the upper and lower pastures of
25 the Mud Creek allotment.

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1 Q. And then they went to -- as I said -- in the north field.

2 And looking at the actual use report, 1198, can you explain
3 where they went when they were taken out on August 22nd?

4 A. On August 22nd, which is in the second column on the
5 Grandad, the 374 head left that allotment and went to the north
6 field on the 23rd, at 374 head. Entered the north field of the
7 allotment -- of the -- of the -- of the north field of the
8 Hardie summer allotment.

9 Q. So, Mr. Steninger, I want to talk to you about that time
10 period between August 22nd and August 23rd, that's in this
11 actual use report. Okay?

12 A. Okay.

13 Q. First of all, can you tell the jury, generally speaking,
14 does -- does an operator like -- are they 374 head of cattle,
15 like, right at the gate, and then a nanosecond later they're in
16 the north field?

17 I mean, that's a bizarre question. But can you
18 explain that?

19 A. No. Kind of what -- it's -- well, let me see.

20 Q. I will -- I will put back up the map, Mr. Steninger. So --

21 A. Let me explain that. Of the -- it's about --

22 Q. There we go.

23 A. (Pointing.) It's about -- roughly four or five miles is
24 the Mud Creek -- whoop. Here's the Mud Creek allotment.

25 So it's in -- these lines, here, are sections.

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1 That's one mile. So you see that -- one, two, three -- say
2 five or six miles to -- to remove, say, the cattle from the
3 lowest end of the Mud Creek allotment, to -- to enter into
4 the Hardie summer, which would be here.

5 You would have to move those cattle, or the cattle
6 would naturally drift, because they're accustomed to grazing
7 this area. And they know at about that time of the year
8 they're moving into higher country.

9 It's roughly about a 1400-foot difference in
10 elevation from the bottom of the Mud Creek allotment to the
11 top. So they -- they've got -- over a period of -- a
12 distance of about six miles, or so, they've got to move up --
13 uphill about 1400 feet to enter into the Hardie -- Hardie
14 summer allotment. Which, incidentally, is about the same --
15 about 14 to 1500 feet elevational change from the beginning
16 of the Hardie summer allotment to the top of the Hardie
17 summer allotment.

18 But they were scheduled in 2006, was to go from the
19 Mud Creek to Bridge Creek. And the actual move that shows
20 on the actual use report, which -- which would have -- over a
21 period of, say, 48 hours, if you're looking at the strict
22 entry of the 23rd -- 22nd and 23rd, over a period of 48
23 hours, essentially with the movement of the cattle from the
24 Mud Creek into the Hardie summer, and they went into the
25 north field, across the Bridge Creek, along into -- into the

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1 north field.

2 Q. In reviewing the record, what did you understand was
3 accomplished by the Hammonds on August 22nd, 2006?

4 A. Restate the question.

5 Q. In your review of the record, what did you understand was
6 accomplished by the Hammonds on August 22nd, in doing this
7 transition that you've talked about between August 22nd and
8 August 23rd, up to the north field?

9 A. Well, the actual use report would say -- is that beginning
10 the morning of the 22nd and ending the evening of the 23rd, the
11 movement of the cattle went from the Mud Creek to the Hardie
12 summer allotment.

13 Q. And in terms of in the 22nd, what would one do if one would
14 go into the lower pasture? What -- what would a prudent
15 operator do to begin making that move?

16 A. Well, to begin with, not only do the elevations change
17 here, but you've got Mud Creek to the south. You've got Bridge
18 Creek to the north. And the country is sloping up onto the
19 Steens Mountains.

20 So you would get these cattle started. And, of
21 course, their custom and habit is to move to higher country.
22 And they know this country. When you begin making some
23 movement, you could stir them around a little bit, get
24 them -- maybe holler at them, get them started, they would
25 naturally -- in a natural progression of it, you would get

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1 the cattle started. And -- and in this case, you would be
2 moving through, to the gates right in this area here, between
3 the upper Mud Creek and the Bridge Creek field.

4 The cattle would then be entering into this field.
5 After they had moved up, you would check it either horseback
6 or afoot or with an ATV, or however, down in this lower
7 country, to be sure you had all of your cattle moved up. And
8 then you would close the gates behind it.

9 But the natural movement of the cattle would be to
10 move to that higher country, what they were accustomed to.

11 Q. In looking at Exhibit 1210 of the boundary fence between
12 the lower field and the upper field, would any operator go and
13 open up gates in between those two -- those two pastures, to
14 make the move?

15 A. Certainly. You would be -- you would be opening the gates
16 between the lower and the upper, so that the cattle can move
17 into the upper field -- upper field of Mud Creek, as they
18 progressed up the mountain into the Hardie summer.

19 Q. And in looking at Exhibit 1210 -- and you indicated there
20 was a road that you went through. Is that a particular gate
21 that you went through?

22 A. Yes, it is.

23 Q. And in terms of going, if you were down here, right at the
24 boundary of the Mud Creek allotment and -- and the refuge,
25 what's the distance between about the western boundary of the

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1847

1 Mud Creek and -- and the gate locations at least that you went
2 through?

3 A. A couple of miles.

4 Q. And could one do that on a horse?

5 A. Yes.

6 Q. Could one do that via walking?

7 A. Yes.

8 Q. Could one do that via truck?

9 A. Yes.

10 Q. Could one do that via ATV?

11 A. Yes.

12 Q. Now, is -- is there anything, in terms of any gates on the
13 northern part of the lower field -- at least in your
14 observations -- and you weren't there in 2006. But in -- what
15 is your opinion of your observations about opening up any gates
16 that may be in water gaps on Bridge Creek, about getting access
17 down in that area?

18 A. Bridge Creek is a very deep, steep canyon. And there is --
19 I went to the water gap at the lower end of it, where the
20 cattle could go into -- into Bridge Creek.

21 But mostly it's a natural barrier on the north end,
22 on -- on the Bridge Creek. The primary fencing in there
23 would be between the Lower Bridge Creek and the Upper Bridge
24 Creek.

25 Q. Would you find it customary that somebody may want to walk

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1848

1 down in that canyon to open up gates, or to move any cattle
2 that may be trapped in a water gap?

3 A. Yes. And on that canyon, it may be easier to go afoot than
4 it would horseback. It's real steep, rough country.

5 Q. Now, in all of your buckaroo days of being on a horse
6 and -- and walking or trotting up to different gate locations
7 to move cattle, what's your experience about horses? I think
8 there's been some suggestion about lathering up, or horses
9 sweating. What's your experience with that?

10 A. With respect to this issue right here?

11 Q. Well, it's -- yeah, relative to your opinion as to using of
12 horses to go up to a gate and open up the gate and going back
13 to the refuge.

14 What would you expect to see of a horse?

15 A. Well, isn't -- it's very rough, rocky country. And it's
16 not a place you would be trotting or loping a horse. You would
17 mostly be walking.

18 And if you made the full -- say, from this gate
19 here, the full circle up to open up, say, the gate into
20 Bridge Creek, or even to check all of the gates against the
21 school section, which is a fenced federal range unit, would
22 be an area of about six miles.

23 And if you made a -- walked your horse, opened the
24 gates, and checked the gates, and came back down to -- to the
25 gate between the two fields, if you did that in a couple of

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1849

1 hours, you would averaging -- well, two miles an hour. So
2 there would be no reason for a horse to be lathered up doing
3 that.

4 And then you wouldn't -- that -- even -- even the
5 road that's in there, you can go ATV or pickup on it. But
6 that's a really rough Oregon lava country. And you could
7 pretty near walk as fast off that road as you could -- you
8 would either have to go horseback or afoot, mostly, when
9 you're off that road.

10 Q. Mr. Steninger, there's -- now I want to move you to the
11 August 23rd.

12 And in your review of the record, do you understand
13 the Hammonds were observed up in the Hardie summer allotment
14 area in the morning of August 23rd, 2006?

15 A. Yes. I saw that in the record.

16 Q. And relative to what you have reviewed on the actual use
17 report, would you consider it prudent that the Hammonds were up
18 in that area, to continue to -- their move of the livestock
19 into the north field?

20 A. Yes. It -- it would be prudent and reasonable for them to
21 go up into that area, to see that -- where the location of the
22 cattle were and how they were progressing up the mountain.
23 Because it would be a natural movement for the cattle to go up
24 the mountain. To see if there were any cattle left down below,
25 and to check to be sure that -- see any gates or any corners or

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1850

1 any places the cattle would be held because they were in a
2 corner, that that gate would be opened. Check to see that the
3 gates were open.

4 And if you felt all of your cattle had moved out of
5 the lower allotment, then you would go close the gates behind
6 them.

7 Q. Now, in the area of August 23rd, 2006, in your opinion, if
8 one wanted to go up there to open gates and -- and to access
9 the area to open gates in a different area, what -- what would
10 you say about the use or the lack of use of a horse to do that?

11 A. As in -- as in a normal prudent, reasonable operation,
12 excluding any emergency going on, the thing would -- would be
13 to go up there in a pickup, and walk to the gates, and see if
14 they're open.

15 If you see that there's a problem and you had to
16 come back with a horse or an ATV, then you would come back
17 and take care of it.

18 And in normal circumstances -- it wouldn't be in
19 a -- a -- an emergency or an urgent situation -- you would be
20 checking on the natural movement of your cattle as they were
21 moving up into the -- to the Hardie summer pasture or field
22 that they were headed for.

23 Q. Now, in this case, though, we were in -- there was
24 information as to lightning strikes and a fire that ignited on
25 the 22nd, and was continuing to burn on the 22nd of August.

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1851

1 And how does that impact their presence in the movement of
2 livestock into the north pasture on August 23rd, 2006?

3 A. Well, to start with, on -- on August 22nd, when they were
4 moving out of the Mud Creek allotment, there had been a fire
5 that was reported by the B.L.M. to be 2500 acres that was laid
6 down but still burning. So you had -- you have a significant
7 fire and fire conditions going on in an area where your cattle
8 are.

9 And so you get those cattle -- the fire was -- as I
10 understand it, was down in the lower part of the field --
11 field, so that they moved the cattle up. And about the end
12 of this road, here, is when you begin to get as -- this last
13 mile, a lot more juniper.

14 This is more open country down in the bottom end.
15 But then you're getting into juniper and more rocks, and the
16 rest of it. And by late afternoon, they had got the cattle
17 up to where they would be -- what we call mothering up. The
18 cows would be getting together with their calves, and they
19 would be moving on up, and in the customary fashion that they
20 would go moving up the country, into the -- into the upper
21 allotments.

22 And, of course, there's a fire behind them. So you
23 would be keeping a special close eye to be sure that your
24 cattle were moving up the mountain.

25 I think they had reason for concern because they

Steninger - D - By Mr. Schroeder

1852

1 could -- they could see that there was additional fires
2 taking place up there. And they had been notified by the
3 B.L.M. that there were additional fires which were
4 essentially ahead of the cattle.

5 So that would raise you to a pretty high level of
6 alertness that you may have a fire ahead of your cattle and a
7 fire behind them.

8 Q. To interrupt you, Mr. Steninger, are you talking about that
9 backburn operation that's in the record, that's relative to the
10 Bridge Creek Road?

11 A. Yes. Because there was -- B.L.M. had reported to them, the
12 evening of the 22nd, that they were building fires up in the
13 Bridge Creek field, which is their next scheduled field to be
14 going to on their 2006 grazing billing.

15 Q. And in terms of a prudent operator -- they either got that
16 information via phone on the 22nd or learned of that
17 information on the 23rd of August. What would that tell a
18 prudent operator you -- he or she needed to do?

19 A. Be sure and get up -- be sure the gates were open and that
20 there weren't any cattle that might get trapped with a fire
21 that is -- just because the fire was laid down, you've got
22 higher -- high burning conditions and a dangerous situation for
23 the cattle. You would want to be sure that they were moving.
24 Because, again, from the beginning of the Bridge Creek field to
25 the higher end of the north field is, again, an elevational

Steninger - D - By Mr. Schroeder

1853

1 increase of 14 or 1500 feet. Therefore, the vegetation would
2 be greener, not as far developed, less apt for a fire to go
3 further up the mountain. And that's where you would be wanting
4 to get your cattle up as far away as you could from the -- from
5 the fire situation.

6 Q. Now, we've mentioned about the 374 cattle that were in that
7 actual use report.

8 Were those cow or cow/calf pairs?

9 A. Principally cow/calf pairs. But there could be bulls with
10 them as well.

11 Q. Okay. And so when it puts on the actual use report 364
12 cows, if you're talking about the number of animals, it would
13 mean perhaps twice that much? Would it not?

14 A. Well, if every cow had a calf, yes. Because the calf
15 doesn't count. The cow and the calf only counts as one.

16 Q. So based upon your education, experience, and background,
17 was this activity by the Hammonds of -- of moving their cattle
18 out of the lower pasture, in light of this fire event, the Mud
19 Creek allotment, and moving them to the north pasture of the
20 Hardie summer a prudent thing to do?

21 A. Prudent and reasonable.

22 Q. Now, there was some testimony about a compliance check,
23 Mr. Steninger, by the B.L.M. on August 10th, 2006, finding 50
24 pairs of cattle in the Thompson and cabin pastures of the
25 Hardie summer.

Steninger - D - By Mr. Schroeder

1854

1 Would that fact change your opinion you've already
2 expressed?

3 A. No.

4 Q. And why is that?

5 A. Well, there's no question there was still cattle down in
6 the Mud Creek allotment. And this is a -- a -- and the
7 movement -- movement of cattle in the actual use report --
8 basically, you can't be moving -- if you kept a record of every
9 head that was going through every gate, it would be a ten-page
10 report.

11 So this shows that the principal movement of the
12 cattle from the Mud Creek allotment to the north field
13 occurred over about a 48-hour period.

14 Some cattle -- and the compliance report that
15 reported the 50 head up there, it didn't specify them in any
16 particular field. They said it was -- it was in the Hardie
17 summer area. But there's no question there was still a
18 substantial amount of cattle down in the Mud Creek area.

19 So I -- I -- the fact that there's only 50 -- 50
20 pair -- apparently there wasn't any concern of the B.L.M.,
21 and the compliance report reported that they were there, but
22 they took no trespass action. And -- and -- and, in fact,
23 had a report a few days later -- I think it was on the 17th
24 of August, same range conservationist, that reported that --
25 that movement was just beginning to occur into the Hardie

Steninger - X - By Mr. Papagni

1855

1 summer allotment. Same guy made both reports.

2 So it was pretty much a natural movement of cattle,
3 as you moved up -- moved up the country.

4 MR. SCHROEDER: Thank you, Mr. Steninger. No further
5 questions.

6 MR. BLACKMAN: Oh, no questions.

7 THE COURT: Cross.

8 CROSS-EXAMINATION

9 BY MR. PAPAGNI:

10 Q. Mr. Steninger, the exhibit you seem to be relying on is the
11 Exhibit No. 1198.

12 MR. PAPAGNI: If you could put that up, please.
13 Exhibit No. 1198.

14 THE WITNESS: The actual use report?

15 BY MR. PAPAGNI:

16 Q. Yes, sir.

17 A. Yes, sir.

18 MR. PAPAGNI: That one. That's fine.

19 BY MR. PAPAGNI:

20 Q. Who signed that report, Mr. Steninger?

21 A. It was signed by Steven Hammond on --

22 Q. Okay.

23 A. -- the 1st of January 2007.

24 Q. And pretty much everything you're testifying about the
25 movement of cattle, relies upon the accuracy of that report,

Steninger - X - By Mr. Papagni

1856

1 doesn't it?

2 A. Well, I -- I mean, I'm relying on it because the Bureau of
3 Land Management relied on it when they filled out those
4 remaining columns, in reporting the dates of the movement.

5 And also the -- the transcript of telephone call on
6 the night of the 22nd from Joe Glascock, the range
7 conservationist and resource advisor that had observed the
8 cattle down there on the 22nd. He was -- and the report from
9 the area manager on either the 24th or 25th, that the move
10 had satisfactorily been made.

11 Q. Mr. Steninger, have you talked to Joe Glascock?

12 A. He called me on the telephone, and asked me what I was
13 going to testify about.

14 Q. Um-hmm. Mr. Glascock did?

15 A. Yes.

16 Q. And when did he do that?

17 A. Oh, it would have probably been about the middle -- middle
18 to latter part of May.

19 Q. When did you write a report about this case, sir? When
20 were you asked to write a report that you're testifying about
21 today?

22 A. Been -- would have been after that. After my inspection
23 on -- on the 30th and the 31st of May.

24 Q. And that's May of 2012?

25 A. Correct.

Steninger - X - By Mr. Papagni

1857

1 Q. Okay. So you spoke to Mr. Glascock?

2 A. I spoke to Mr. Glascock. He asked what I was going -- saw
3 that I was on the witness list, and asked what I was going to
4 be testifying about.

5 Q. Is it Mr. Glascock or a Mr. Shrader? Do you remember?

6 A. There was another fella who said he was an assistant or
7 a -- I think it was an assistant special investigator for the
8 issue.

9 Actually, when Glascock -- Glascock called me, he
10 now works for Baric Corporation in Nevada.

11 Q. Okay.

12 A. And he -- he called and left a message that he now worked
13 for Baric, and he was working with a fella that I know quite
14 well, by the name of Doug Groves.

15 Q. Um-hmm.

16 A. And in the phone conversation, he first indicated to me
17 that -- that Baric Corporation maybe wanted me to do some work.

18 Q. Okay.

19 A. When I answered the phone, I could hear someone -- as you
20 know by now, I'm hard-of-hearing.

21 I could hear somebody mumbling in the background.
22 And I said, I'm hard-of-hearing. You must be on a
23 speakerphone. Speak up.

24 And that's when the fellow identified he was some
25 kind of an investigator for the B.L.M.

Steninger - X - By Mr. Papagni

1858

1 Q. Was that a Mr. Windham?

2 A. Yes, it was Windham.

3 Q. Okay. So did you talk to Mr. Glascock or Mr. Windham, sir?

4 A. Both of them. They were on the speakerphone.

5 Q. Did you ever have a chance to talk to Mr. Glascock about
6 his observations on August 17th, Mr. Steninger?

7 A. He just told me that he -- he had observed Hammonds setting
8 the fire.

9 Q. Mr. Glascock did?

10 A. Mr. Glascock told me that.

11 Q. And if you could, by courtesy of the bailiff, Exhibit
12 No. 60, please.

13 A. I didn't hear that.

14 Q. I'm sorry, sir.

15 Exhibit 60 -- Government Exhibit 60. I think that's
16 the correct one.

17 A. Do you want me to hold that up?

18 Q. I think that works, sir.

19 Do you see on Government's Exhibit -- Exhibit No.
20 60, where it says "cattle"?

21 A. (Pause, referring.) I see "cattle" on the circle, yes.

22 Q. Okay. And if the cattle that we've been talking about,
23 that you've been testifying about for the last hour, were at
24 that location on August 17th, would that change all of your
25 opinions about what was reasonable and prudent when there's a

Steninger - X - By Mr. Papagni

1859

1 fire burning to the west?

2 A. No. Because if there's 50 -- there are 50 cattle in that
3 area, then that wouldn't mean that there were no cattle down
4 where this fire was occurring.

5 Q. Hmm. How many cattle were down where the fire was
6 occurring on August 22nd, that you know from talking to someone
7 besides the Hammonds?

8 A. All I can rely on is the actual use report that said there
9 was 374. Apparently 50 of them were -- had already moved up
10 the mountain.

11 Q. And who signed the actual use report, Mr. Steninger?

12 A. Steven Hammond signed it, and the Bureau accepted it, and
13 calculated the AUMs.

14 Q. Now, those actual use reports, sir, where was Mr. Steven
15 Hammond on August 23rd?

16 A. On August 23rd?

17 Q. Yeah. Where was Steven Hammond on August 23rd?

18 A. Well, I wasn't there on August 23rd. But the -- what I see
19 in the record, he was -- he was up on the -- in the Bridge
20 Creek Road area.

21 Q. Doing what?

22 A. Opening or closing gates, getting the cattle moved on up
23 the mountain.

24 Q. And where was he on August 22nd?

25 A. He was down in the Mud Creek allotment, pushing the cattle

Steninger - X - By Mr. Papagni

1860

1 up the mountain.

2 Q. Would have made sense to push the cattle back on the
3 Malheur refuge, where it's green? There was no fire in front
4 of them?

5 A. Well, the natural movement of the cattle at that time of
6 the year would be to go up the mountain.

7 Q. Through the fire?

8 A. There wasn't any fire ahead of them.

9 Q. Hmm. Do you know what a red flag warning is, sir?

10 A. Pardon?

11 Q. A red flag warning?

12 A. Yes.

13 Q. Do you know if a red flag warning was in effect from about
14 eight o'clock in the morning till --

15 A. I heard -- I heard it testified to today.

16 Q. Right. And there was a fire burning at the time. Right?

17 A. Yes.

18 Q. And did the fire get worse in the afternoon, when the RHs
19 drop and -- and the winds get higher and it's 90 degree
20 temperatures? Do you know about that?

21 A. Correct. And so if you have a fire, even though it was
22 laid down, down in the lower country --

23 Q. Um-hmm.

24 A. -- you better be getting away from it. And if the cattle
25 want to go uphill, then that's a good, safe place to go.

Steninger - X - By Mr. Papagni

1861

1 Q. And you're going to move them on foot for about six miles?

2 A. Pardon?

3 Q. And you move them on foot for about six miles?

4 A. My understanding is that they moved the cattle up about
5 two-thirds of the way, up to the end of the road I showed on
6 the map.

7 Q. Um-hmm.

8 A. And were using horses at that time.

9 Q. Why wouldn't you move the cattle to the flanks of the fire,
10 sir -- why wouldn't you move the cattle to the flanks of the
11 fire, either to the north or south, as opposed to in front of
12 the moving fire?

13 A. Well, there were deep canyons on both sides.

14 Bridge Creek to the north and Mud Creek to the
15 south. And the natural movement of the cattle and the slope
16 of the country were not to be moving to the side, but it
17 would be where -- the natural tendency of the cattle to go
18 would be to move them uphill, into higher country, greener --
19 greener forage, a safer area.

20 Q. When you talked to Mr. Glascock, how many cattle did he say
21 were in the area, being moved by the Hammonds on the morning of
22 the 22nd?

23 A. He didn't tell me.

24 Q. He didn't tell you, did he?

25 A. (Shakes head.)

Steninger - X - By Mr. Papagni

1862

1 Q. How many cow/calves did the Hammonds say they were moving
2 on the morning of the 22nd?

3 A. I didn't ask that because I was relying on the record.

4 Q. Wouldn't it have been helpful actually ask them what they
5 were doing?

6 A. Well, it would -- not necessarily.

7 Q. Oh.

8 A. There were cattle -- there were cattle in the lower field.

9 Q. How many cattle --

10 MR. BLACKMAN: Your Honor, we'll have a matter for the
11 Court at a convenient time.

12 THE COURT: Yes.

13 BY MR. PAPAGNI:

14 Q. How many cattle were on the lower field, sir?

15 A. According to the actual use report, it was 374.

16 Q. And that's what you relied upon?

17 A. Yes.

18 MR. PAPAGNI: Thank you. Those are all of my
19 questions.

20 THE COURT: Anything more?

21 MR. BLACKMAN: Well, your Honor, I think we should
22 have a sidebar about a matter. I'm apologize for that.

23 But I think, under the circumstances of that
24 cross-examination, there are two matters we should raise with
25 the Court before we decide whether to redirect or not.

Colloquy

1863

1 THE COURT: All right.

2 (The following sidebar was reported.)

3 MR. PAPAGNI: Yes, sir.

4 THE COURT: Okay. Fine. I know -- go ahead and tell
5 me what your two things are.

6 MR. BLACKMAN: Well, the first relates to the fact
7 that -- oh, sorry.

8 The first relates to the fact that immediately after
9 Mr. Glascock and Mr. Windham called Mr. Steninger, when they
10 learned he had been identified as a witness, expert for the
11 defense, he contacted Mr. Schroeder, to let him know that
12 he -- this was the first time he had experienced someone from
13 the opposition, in litigation, make an approach to him. And
14 that Mr. Glascock basically was telling him about this
15 facility -- working at this ranch; which he understood to
16 mean that Glascock was calling him, looking for possibly
17 retaining him.

18 MR. PAPAGNI: Oh.

19 MR. BLACKMAN: And that Mr. Windham was in the --
20 working in the background. Once -- he wanted to know why a
21 grazing man was involved, as the matter doesn't involve
22 grazing. And this is a communication between the consultant,
23 working for the defense, and the lawyer who retained him.

24 I don't know if Mr. Schroeder wants to go into this,
25 and -- and have Mr. Steninger talk about how unusual it was

Colloquy

1864

1 and why Mr. Glascock was posing as interested in contacting
2 him through the -- through his employer, but in fact having a
3 special agent there. And if that would deem -- be deemed
4 some kind of waiver of some kind of privilege, which would
5 not be appropriate.

6 This was invited by Mr. Papagni's cross-examination.
7 I believe this was totally improper conduct on the part of
8 the Government and totally improper conduct on the part of
9 Mr. Glascock. But I don't want us to be in the position
10 where we're somehow opening a door to whatever other
11 communications may have occurred between Mr. Schroeder and
12 Steninger.

13 Then the other issue, which I think you also are
14 anticipating, is the cross-examination about what did the
15 Hammonds tell you; which of course, we attempted not to have
16 the Hammonds communicate with him, Mr. Steninger, precisely
17 because he couldn't rely on that if they aren't going to
18 testify. We have not yet made a decision whether they're
19 going to testify or not, but having --

20 THE COURT: I'll take care of that one.

21 MR. PAPAGNI: Okay. I agree with that one.

22 The other one that concerns me, the Glascock part --
23 was Mr. Steninger on the case then already, Marc?

24 MR. BLACKMAN: Oh, yes. We gave you the name -- I can
25 document when we provided the name.

Steninger - X - By Mr. Blackman

1865

1 MR. PAPAGNI: No. I was just wondering.

2 THE COURT: Yeah, I think you can go into that.

3 MR. PAPAGNI: Yeah.

4 MR. MATASAR: Without --

5 MR. PAPAGNI: I think he can.

6 THE COURT: And Frank agrees. Okay.

7 MR. BLACKMAN: It doesn't open any doors.

8 MR. PAPAGNI: I'll keep my mouth shut.

9 (Conclusion of sidebar.)

10 MR. BLACKMAN: Under the circumstances, your Honor --

11 THE COURT: Just a moment.

12 Members of the jury, there was a question asked in
13 this last portion about whether the witness had talked to
14 Mr. Hammond about certain matters.

15 You're not to consider that question or answer,
16 please. All right?

17 Go ahead.

18 CROSS-EXAMINATION

19 BY MR. BLACKMAN:

20 Q. Okay. Mr. Steninger, in response to Mr. Papagni's question
21 about ever having spoken to Joe Glascock --

22 A. Excuse me?

23 Q. Oh, sorry. (Moving microphone.)

24 In response to Mr. Papagni's question about whether
25 you ever talked to Joe Glascock, you made reference to the

Steninger - X - By Mr. Blackman

1866

1 fact that you had received a call from Joe Glascock on May
2 24th of this year. Correct?

3 A. I didn't say the date, but it was prior to my inspection.

4 Q. Okay. And do you recall that it was immediately after
5 receiving that call that you sent an e-mail to Mr. Schroeder to
6 report that you had received that call?

7 A. Yes.

8 Q. Okay. Now, when you received that call, the person who
9 told you he was calling identified himself as Joe Glascock
10 of -- of Baric Mining Company?

11 A. Correct.

12 Q. And I think you testified -- but I want to make sure --
13 what did you understand he was calling you for? How did he
14 identify himself?

15 A. In the -- it was a phone message left on my office
16 telephone.

17 Q. I see.

18 A. Is when he first identified himself to be an employee of
19 Baric Mining Corporation, working with Doug Rose, who was a
20 manager of a ranch for Baric. And asked that I call back.

21 But -- but the tone of it, he -- at that point,
22 there was no indication -- and I didn't know who Joe Glascock
23 was. I just thought he was an employee of Baric that wanted
24 to talk to me about Baric business.

25 Then I returned the call. And it was at that time

Steninger - X - By Mr. Blackman

1867

1 that he and, I believe it was Wisdom or Windham, or
2 something, was -- together, were on the phone.

3 Q. And so when you returned that call, did you find out that
4 Mr. Glascock was not actually calling you on behalf of the
5 Baric Mining Company?

6 A. I did. I found out then.

7 Q. And what did you find out the reason for his call was?

8 A. He said that he was -- he had been a range con on the 2006
9 fire, and I am the one that caught Hammond setting fires. And
10 wanted to know what you want to testify -- what you're going to
11 testify about because we saw your name on the witness list.

12 Q. Okay. Now, you've been involved in litigation many times
13 over the years, haven't you?

14 A. Yes.

15 Q. Had anything like that ever happened to you?

16 A. No.

17 Q. Had anyone ever called, saying they wanted to talk to you
18 about one thing, and then have someone else on the call, not
19 advising you that they were listening in?

20 A. No.

21 Q. And it wasn't until you said, I'm a little hard-of-hearing,
22 it sounds like you're on a speakerphone, was the first time
23 that you were advised by Mr. Glascock, or someone else, that a
24 second person was there?

25 A. Yes. I could hear someone in the background. But -- and I

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1 think he identified who his name and position was. But I asked
2 him to get off the -- or get closer to speakerphone, or get to
3 where I could hear who he was and what they were talking about.

4 MR. BLACKMAN: That's all.

5 MR. PAPAGNI: I just have one question, Judge.

6 RECROSS-EXAMINATION

7 BY MR. PAPAGNI:

8 Q. Mr. Steninger, I want it clear.

9 Mr. Glascock --

10 A. Would you get closer to your mic.

11 Q. I'm sorry, sir. It's my fault.

12 I want to know who the people -- Mr. Glascock called
13 you and spoke to you?

14 A. Yes.

15 Q. I mentioned Mr. Windham. Could it have been a Mr. Shrader?

16 A. No, it was Windham.

17 Q. Okay. And that's all I need to know.

18 Thank you, sir.

19 THE COURT: You may step down. Thank you.

20 Call your next witness.

21 MR. BLACKMAN: Your Honor, our next witness is
22 Mr. Hogue.

23 He's going to take quite a while, and I really don't
24 want to do that at the end of the day, where --

25 THE COURT: Here's the thing. I don't know if we can

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1 get some of it in.

2 How long do you think redirect is going to be,
3 Mr. Papagni?

4 MR. PAPAGNI: I'm going to make it as brief as I can.
5 I don't expect to be longer than 20 or 30 minutes.

6 THE COURT: All right. How long do you expect to take
7 with Mr. Hogue?

8 MR. BLACKMAN: We have tried to hone it down, your
9 Honor. I think we can get through the direct in under an hour,
10 with the understanding that we may have substantial redirect
11 depending on cross-examination. Because what I'm hoping -- and
12 I hope you don't mind me discussing this in front of the jury.
13 I am hoping --

14 THE COURT: Members of the jury -- that's all right.
15 Here's your schedule. I'm going to release you for the day.
16 In the morning, we're going to take this last bit of evidence.
17 Then I'll give you the Court's instructions on the law.

18 I expect then, after that, we'll start argument on
19 this case before lunch tomorrow. You'll have the case
20 tomorrow, in time to deliberate tomorrow.

21 That's -- and if -- if the attorneys seem a little
22 pressed by me, don't blame them. Blame me. All right?

23 So have a good evening. We'll see you -- drive
24 careful, for those of you who are driving. I'll see you
25 tomorrow at 9:00.

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1 MR. BLACKMAN: 9:00?

2 THE COURT: Yes.

3 MR. MATASAR: Are we going to stay now, your Honor?

4 THE COURT: Yes.

5 The lawyers -- they want to stay with me for a
6 while.

7 (Laughter.)

8 THE COURT: So they're going to have the chance to.

9 (Jurors exit.)

10 THE COURT: Mr. Papagni.

11 MR. PAPAGNI: Please the Court, we just went -- went
12 through something that I don't think I have experienced in
13 about 21 years.

14 What I have in my hand -- which the defense doesn't
15 have it. I'll be glad to give them a copy. Is -- it says,
16 Residence Inn Marriott, Chapel Hill, to Dennis Shrader from
17 Joe Glascock. And it says, Questions regarding -- from Joe
18 Glascock regarding -- well, from Joe Glascock -- G, regarding
19 questions for Al Steninger or if Steve Hammond takes the
20 stand.

21 When I got these, I looked at them, and I compared
22 them to Mr. Steninger's report. What I erroneously assumed
23 was it was nothing more than a former range con giving me
24 some good questions, having reviewed Mr. Steninger's report.

25 When Mr. Steninger -- who I have no doubt was

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1 telling the truth -- said that he had received a call from
2 Mr. Glascock, then I wanted to know who the investigator was.

3 And Mr. Windham and I have worked closely on this
4 case, and he's just confirmed for me it was him. But this
5 was faxed to Mr. Shrader and then given to me.

6 THE COURT: You know I have some concern about his
7 participation here.

8 MR. PAPAGNI: I understand. And I also -- this Court
9 also understands that when you ask me a question, you get an
10 answer.

11 THE COURT: Yes.

12 MR. PAPAGNI: And I think it's only appropriate for me
13 to give a copy -- I -- I don't see a Bates number on this
14 either. I want a copy given to defense counsel.

15 I don't think it makes any difference, because I
16 didn't ask all of the questions. Once I realized the
17 situation, that's when I backed down.

18 And I was under the impression, erroneously, that
19 the Hammonds had spoken to Mr. Steninger.

20 So to defense counsel, you have my apology for that
21 misunderstanding. That's the reason why I asked that
22 question.

23 I want that to be clear, because I like to fight
24 hard and I like to -- but I like to fight fair. And I'll
25 have this copy provided to the defense counsel immediately.

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1 THE COURT: You're as good as there is in that regard,
2 Mr. Papagni.

3 I -- I -- you should know, I'll tell you at this
4 time. As you -- if you try to call Mr. Shrader on redirect
5 [sic], I will not permit it.

6 I'm -- I was offended by him in the meeting,
7 threatening to take someone to the grand jury. Something he
8 has no authority to do, as we all know. And that resulted
9 in -- in part in a bad situation. I haven't decided whether
10 to take action with regard to that concerning one of the
11 counts here. But it's something I'm -- that's why I've kept
12 it, because I'm not surprised that something else may have
13 come up in that regard. So that doesn't mean I will, but I'm
14 not going to have any secrets about this either. All right?

15 Did you have some response?

16 MR. BLACKMAN: Your Honor, I -- Mr. Matasar may know
17 what's going on here, but I don't.

18 MR. MATASAR: I was going to say the same.

19 I think you -- I think Mr. Papagni may assume we
20 know more than we do, and the Court may assume we know more
21 than we do. I -- I'm just not understanding. I am not at
22 all saying Mr. Papagni is doing anything wrong.

23 THE COURT: Of course you're not.

24 MR. MATASAR: I can tell -- I can tell he's doing
25 something right, but I don't know what it is. That's the

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1 problem.

2 (Laughter.)

3 THE COURT: Just accept his -- he plays by the rules,
4 and so do you fellas. And, you know, I have -- I don't know
5 Mr. Schroeder as well, but I like him. But I have a history
6 with the three of you, and you have a history with me. And we
7 call it straight. That's all.

8 He's done what he should do. And whether it makes
9 any difference or not, you have that. You can do with it
10 what you want, frankly.

11 MR. BLACKMAN: But is it -- you just made reference to
12 some concern about something that I -- at least --

13 THE COURT: That was in the material I was given about
14 Mr. Shrader. He made some statement about taking some matters
15 to the grand jury.

16 And if you look at his statement, it includes that.

17 MR. BLACKMAN: Okay.

18 THE COURT: And I don't think that's appropriate for
19 him to do that. And sometimes -- he's been kind of
20 enthusiastic in the past about things. And so that's -- I'm
21 careful about it. That's all.

22 MR. BLACKMAN: I see.

23 THE COURT: I care that we have a very clean
24 proceeding here.

25 So does Mr. Papagni. And so do you both.

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1 So -- that's because we're all professionals about
2 what we do. We take it seriously.

3 Okay. Now, despite all of that, this is the pen my
4 law clerk's been using to make notes (indicating) during this
5 trial.

6 MR. BLACKMAN: Is that a Pilot, your Honor?

7 THE COURT: It is the same pen that --

8 MR. BLACKMAN: Because we noticed that the -- the
9 small carton that we had wasn't full anymore. So --

10 (Laughter.)

11 MR. BLACKMAN: But it --

12 THE COURT: That's certainly misdemeanor category.
13 Here's the missing golf tee (indicating).

14 (Laughter.)

15 MR. BLACKMAN: All right.

16 THE COURT: We heard a reference to *Range Magazine*.
17 It's a magazine with a particularly unique take on land use
18 policy in the west, but it has the most beautiful pictures in
19 it. And wonderful stories about dogs, and things like that,
20 that I like. I've never paid for a subscription, but some
21 people think I need to be educated on it.

22 MR. MATASAR: The same, your Honor. I'm with you.
23 I've been getting it for years myself. For the same reason.
24 Somebody thinks I should read it.

25 THE COURT: The only -- we had horses. Of course, we

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1 weren't in bunch grass country. But of the hundred pair that I
2 was responsible for in high school, my daddy said, You're going
3 to be on shanks' mare when you work the cattle, because I don't
4 want them -- the horses upset.

5 Okay. Now that we've gone through things -- the
6 serious and the -- and the not serious -- let's look at
7 instructions.

8 Mr. Hammond has not been called. I would intend to
9 take out -- I know that could still happen. But I intend to
10 take out the instruction that starts at the bottom of page 8
11 and goes over to page 9 about prior convictions.

12 I want to ask the defense whether you intend --
13 whether you wish to have the jury instructed on necessity and
14 on public authority.

15 (Pause, counsel conferring.)

16 THE COURT: Everybody gets to make decisions now.

17 MR. BLACKMAN: I think it -- your Honor, it's
18 really -- I think those two defenses are more particularly
19 applicable to Steven Hammond. So I'm suggesting to
20 Mr. Matasar --

21 THE COURT: You can chicken out, if you want,
22 Mr. Matasar.

23 MR. MATASAR: I can't chicken out. I think the answer
24 is yes.

25 THE COURT: Both of them?

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1 MR. MATASAR: Well, let me just have a second to
2 confirm --

3 THE COURT: It takes an affirmative showing on public
4 authority.

5 MR. MATASAR: I understand.

6 MR. PAPAGNI: I thought the Court indicated you wanted
7 something in writing, too, on it before now.

8 MR. MATASAR: I think now, not, your Honor.

9 THE COURT: Won't go on either one?

10 MR. MATASAR: We'll go with the beyond the reasonable
11 doubt, malicious --

12 THE COURT: Okay. We'll take those two out.
13 Other input on instructions?

14 MR. PAPAGNI: On pages -- page 9, I think you just
15 referred to Mr. Steven Hammond regarding Count 7. And I think
16 it needs to include both defendants.

17 THE COURT: Hang on just a second.

18 MR. PAPAGNI: I could be wrong about that.

19 THE COURT: Page 9. I must be at a different place
20 than you.

21 MR. PAPAGNI: The draft I have --

22 THE COURT: I have a newer draft, however, than you
23 have.

24 MR. BLACKMAN: Oh.

25 MR. PAPAGNI: Let me check.

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1 First of all, I think we could eliminate the word
2 "or explosive." We're not claiming any explosives in this
3 case.

4 THE COURT: Want to eliminate "explosives." Fine.

5 MR. PAPAGNI: I think that was a part of the statute.

6 And then No. 7, Count 7, I -- at least when I looked
7 last night, it refers only to Mr. Steven Hammond. And
8 clearly that's the case that involves Mr. Okeson and --
9 Mr. Dwight Hammond.

10 THE WITNESS: So I think we should include both.

11 I'm looking at your clerk and --

12 THE COURT: You want both names on Count 7. Both
13 defendants.

14 MR. PAPAGNI: That's all I have.

15 THE COURT: All right.

16 MR. PAPAGNI: And then I have a comment on the verdict
17 form.

18 THE COURT: We'll get to that in a second. I have a
19 few myself.

20 On instructions, gentlemen?

21 I'll make a modification to Count 7.

22 MR. BLACKMAN: Your Honor, it's odd for us to be doing
23 this before we have done our motions for judgment of acquittal.

24 THE COURT: Of course.

25 MR. BLACKMAN: And we do have what we believe to be

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1 good motions. So --

2 THE COURT: Um-hmm. I'm -- I'm -- the one issue
3 you're going to raise is amount. I've got that under
4 consideration already, if you make your motion. But --

5 MR. BLACKMAN: There's a second motion, your Honor.
6 We actually have it in writing (indicating), which we can
7 provide to the Court at this time.

8 THE COURT: All right.

9 MR. BLACKMAN: And the Government.

10 MR. PAPAGNI: Thank you.

11 MR. BLACKMAN: And I would think it would be most
12 efficient to maybe argue it after you've had a chance to read
13 it.

14 THE COURT: All right. Well, what I would like you to
15 do, first, is assume that the -- your motions will be denied.
16 Although, I haven't done it. I haven't even read these. I
17 just anticipate certain things because I've been listening to
18 the same stuff you have.

19 It's -- except -- so counts may come out, of course.
20 You know, it could be Mr. Papagni will decide he doesn't want
21 to go to the jury on all of the counts.

22 You may ask, if you're not going to have some of
23 them. But assuming they're all in, do you have some comments
24 on some of the instructions?

25 MR. MATASAR: Your Honor, I -- I think we can say that

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1 while we received the instructions early, I was anticipating
2 that we would be summoned to some sort of instruction
3 conference.

4 THE COURT: That's where we are right now.

5 MR. MATASAR: I understand where we are right now. I
6 was thinking it might be -- I've been at them at seven o'clock
7 in the morning, in the past, and I was thinking it might be
8 tomorrow before -- we are not as ready as we could be on the
9 instructions. It's just -- that's how it is. And --

10 THE COURT: I'll be here at 8:30. If you have
11 something at that time you want to bring up -- they're,
12 frankly, pretty straightforward.

13 MR. MATASAR: Yes, I've noticed that. I've read them.

14 THE COURT: And then why don't you -- I do want to
15 talk about the verdict form, and have your input on that, if
16 you have it. Why don't you give that to me at this time.

17 And then you can make your record on your motions
18 for directed verdict. All right?

19 So, Mr. Papagni?

20 MR. PAPAGNI: The verdict form, as the Government sees
21 it, is fine. I noticed the last count is missing. And --

22 THE COURT: Yes.

23 MR. PAPAGNI: -- I think there's probably a reason for
24 that.

25 THE COURT: Yes. There's not been any evidence on it.

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1 MR. MATASAR: Count -- so I don't have to make my
2 Count 9 --

3 THE COURT: You can, if you would like.

4 MR. MATASAR: No, it doesn't sound like I need to do
5 it. Great. All that -- all of that preparation, no, I'm not
6 saying anything about --

7 MR. PAPAGNI: I thought that was a clue when I got
8 this.

9 THE COURT: Yes.

10 MR. BLACKMAN: There may be a more recent verdict
11 form.

12 So the Dwight Hammond --

13 THE COURT: Just a moment.

14 (Pause, the Court and law clerk conferring.)

15 THE COURT: I just -- I didn't read the heading very
16 well. I just have the Dwight Hammond verdict form here.
17 Apparently we have two.

18 So that's --

19 (Pause, the Court and law clerk conferring.)

20 THE COURT: Yeah, all right.

21 Don't assume anything. Make your motions.

22 MR. BLACKMAN: I'm sorry.

23 THE COURT: Don't assume anything. Make your motions.

24 MR. MATASAR: Your Honor, I am just going to rely on
25 the -- we're going to rely on our written motion, first, for

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1 the three counts.

2 THE COURT: Sure.

3 MR. MATASAR: I just want to say a few words about the
4 last count, the tampering count. And I'm also going to rely
5 mostly on our trial memo, your Honor.

6 So it's late, and I think you've read it. I want to
7 urge you to look at it again. It's No. 125. It talks about
8 the standards for tampering. That it's got to be a true
9 threat, and there's got to be both an objective and a
10 subjective --

11 THE COURT: That's enough on that.

12 Do you have any position on it?

13 MR. PAPAGNI: No position, your Honor.

14 THE COURT: The motion is granted on that count.

15 MR. PAPAGNI: Good job.

16 MR. MATASAR: I'm the man.

17 MR. BLACKMAN: And with respect to the depredation
18 counts, your Honor, in addition to the motion we filed in
19 writing, which relates to the fact that the case law says that
20 with respect to damage caused by fire, the Government is
21 required to plead it under Section 844(f), not (h)(1) and 361.
22 And that's the subject matter of the written motion.

23 In addition to that legal basis for the motion on
24 416(a) --

25 THE COURT: We'll look at that tonight.

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1 MR. BLACKMAN: Yeah. We don't believe the
2 Government's evidence regarding the so-called damage or
3 depredation meets the standard that is required under the 1361
4 statute because --

5 THE COURT: Are you referring to the thousand dollar
6 minimum?

7 MR. BLACKMAN: And that it has to be actual damage to
8 the property, not the cost of repair.

9 It, of course, also raises the issue -- because I
10 think with Krumbo, the thousand dollar threshold would be
11 reached only if you combine the -- I think it was 600
12 dollars -- it might have been 700 dollars -- for the fencing
13 material, and some allocated percentage of the so-called
14 restoration plan, which we don't believe qualifies as damage
15 or depredation.

16 THE COURT: That's -- that -- that count is the one
17 you have the strongest position on.

18 MR. BLACKMAN: Well, we believe it's also that in
19 order to make a depredation charge, the Government must prove
20 that the land, or whatever the property they're talking about,
21 is damaged, that it's less valuable after the event than it was
22 before the event.

23 THE COURT: I understand your argument.

24 MR. BLACKMAN: And we've made that argument in our
25 trial memo.

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1 THE COURT: Mr. Schroeder had lots of questions about
2 it.

3 MR. BLACKMAN: Yes. And I think he made the point,
4 which is, yes, they paid money to do certain things.

5 But they had no evidence that if they hadn't done
6 those things, the property would have been worth any less.

7 THE COURT: All right. Well, I'll give Mr. Baker
8 credit for the draft of instructions, and the first question I
9 asked him, Did either side request a definition of depredation?

10 MR. PAPAGNI: Ms. Sgarlata had a long discussion with
11 me about that. And I think that unless -- unless he's come up
12 with some Ninth Circuit law we haven't seen, there isn't a
13 whole lot out there.

14 THE COURT: No, there's not. It's interesting.

15 MR. PAPAGNI: And the other part of my argument, just
16 so I make it quick -- we would like to go home -- is I recalled
17 something about they have to intentionally maliciously damage
18 it or attempt to cause that amount of damage.

19 THE COURT: Yes.

20 MR. PAPAGNI: I like the word "attempt" a lot in that
21 particular count.

22 THE COURT: And I'm aware of that opinion.

23 MR. PAPAGNI: I'm sure. Thank you.

24 THE COURT: All right. I'll give you something on
25 that before you argue.

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1 But anything more at this time?

2 MR. PAPAGNI: Not by the Government, your Honor.

3 Oh, by the way, I want it clear that I've provided
4 those copies I've promised to defense counsel. I've got
5 three copies.

6 This is Mr. Shrader and Mr. Glascock's -- I said I
7 would do it. I want to make sure it's on the record. It's
8 done.

9 THE COURT: Yes.

10 MR. PAPAGNI: Thank you, Judge.

11 THE COURT: Thank you. We should probably give that a
12 number.

13 MR. PAPAGNI: If you want me to, your Honor, I'll give
14 it a number.

15 THE COURT: Just for the record.

16 MR. PAPAGNI: 2 -- what's our next number, Cheryl?

17 MS. ROOT: 268.

18 MR. PAPAGNI: This is Government's Exhibit 268, and
19 I'll mark it personally.

20 THE COURT: It won't be received but --

21 MR. BLACKMAN: It's not -- not for the jury.

22 MR. MATASAR: No, not --

23 MR. PAPAGNI: No. This is not going to the jury.

24 This is the record I am making to make sure I've complied with
25 my obligations.

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1 THE COURT: That's right, and that's why I'm doing it;
2 just so it makes it clear for the record.

3 MR. BLACKMAN: Your Honor, the other thing I guess we
4 should do to make the record clear, the evidence that came in
5 during the trial about this radio tag -- that we continue to
6 believe was of significance to this case from day 1 -- and the
7 evidence that came in during the trial, through both Mr. Orr
8 and Mr. White and Mr. Bird indicates that, indeed, a key piece
9 of evidence was never taken into evidence, according to
10 Mr. White. Was apparently coincidentally in a box that was
11 only discovered --

12 THE COURT: Isn't that a chain-of-custody question?

13 MR. BLACKMAN: No. I believe it means that if there
14 had been appropriate handling from day one, that there might
15 have been evidentiary value that has been lost. And because of
16 the --

17 THE COURT: This is the same argument you made before
18 trial. Right?

19 MR. BLACKMAN: It's -- yes. But at that time the
20 Government said in its response that the item was inventoried.
21 It was on the inventory. They attached an inventory to their
22 response to our motion.

23 And, in fact, I will tell you that we thought there
24 was an inventory we had missed. But then when we looked at
25 the inventory that was actually attached, it was the same

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1 inventory which had made no reference to the BK radio tag.

2 But we understood the Government to say that that
3 inventory included the BK radio tag in one of the items that
4 was listed on the inventory.

5 It was only when Mr. White and Mr. Orr testified
6 that it became clear that it never was inventoried.

7 That it never was, quote/unquote, taken into
8 evidence. We think that materially changes the situation.
9 And that the rules about reckless loss of evidence kick in.
10 And that does entitle us to the dismissal remedy that the
11 cases talk about.

12 THE COURT: Well, let me make my position on that
13 clear, so that you have your record.

14 I don't think there's any evidence of recklessness.
15 I do not think it was inventoried properly. I don't think
16 that's -- given the record with regard to a photo, and so on,
17 and its apparent availability, that that is a reason to
18 dismiss.

19 And so that's why I denied your motion before. I'll
20 consider this reference to that again. It's denied again.

21 Anything further?

22 MR. PAPAGNI: Nothing further.

23 THE COURT: All right. Thank you.

24 (Court adjourned.)
25

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--oOo--

I certify, by signing below, that the foregoing is a correct transcript of the oral proceedings had in the above-entitled matter this 20th day of June, 2012. A transcript without an original signature or conformed signature is not certified. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

/S/ Amanda M. LeGore

AMANDA M. LeGORE, RDR, CRR, FCRR, CE